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REPORTED BY

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PRIVY COUNCIL.

P. C.
J. C.
1884

RAJA RUP SINGH (PLAINTIFF) *v.* RANI BAISNI AND THE COLLECTOR OF ETAWAH (DEFENDANTS)

[On appeal from the High Court for the North-Western Provinces.]

Mitakshara—Impartible raj—Succession in joint family to ancestral, impartible, estate—Right of nearest male collateral—Exclusion of widow, where the family is joint, and the estate not separate.

Impartible, ancestral, estate is not, merely by reason of its being impartible, the separate estate of the single member of the undivided family, upon whom it devolves, so long as the family continues joint.

Chintamun Singh v. *Nowlukho Konwari* (1) referred to and followed.

A female cannot inherit impartible ancestral estate, belonging to a joint family, under the Mitakshara, when there are any male members of the family who are qualified to succeed as heirs; a rule of law not dependent on custom; and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them.

Maharani Hiranath Koer v. *Ram Narayan Singh* (2) approved.

Where raj estate, ancestral and impartible, was not separate property and the family was undivided, and where no special custom existed, modifying the Mitakshara law of succession, *held* that the nearest male collateral relation of the last Raja, who died without male issue, was entitled to succeed in preference to the Raja's widow.

This relation, *viz.*, a brother of the late Raja's deceased father, at one time received an allowance for maintenance out of the family estate. What amounted to an attachment of this, according to a subsequent judicial decision, occurred in 1857. *Held* that he had not thereby been deprived of his right of succeeding as a member of the joint family.

Present: LORD BLACKBURN, SIR B. PEACOCK, SIR R. COUCH, and SIR A. HOBHOUSE

(1) I. L. R. 1 Calc. 153; L. R. 2 Ind. Ap. 263. (2) 9 B. L. R. 274.

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RAJA RUP SINGH v. RANI BAISNI.

The raj estate in question originated in the partition of a more ancient one with others out of which minor estates were formed. If in the latter there had been descents to widows, no inference hence, to support the widow's claim to inherit in this family, could be drawn. Such minor estates might have been separate (which estates granted for maintenance probably would be), and in that case the widows of the last holders would have succeeded them in due course of law. Unless connection is shown between families, evidence of a special family custom in one is not evidence of a similar family custom in another.

Appeal from a decree, (7th May, 1880) of the High Court affirming a decree (25th September, 1878) of the Officiating Judge of Mainpuri.

This appeal related to the succession to the Bhara Raj estate in the Etawah district, comprising fifty-four villages, and valued at about Rs. 3,10,265. The principal question was whether the appellant Rup Singh, brother of the late Raja's father, being the male collateral nearest to the late Raja, who died without male issue in 1875, was to be preferred to the late Raja's widow, a minor, on whose behalf the estate had been taken under the management of the Court of Wards.

The impartible Raj of Bhara passed from father to first-born son for many generations, the younger brothers of the family receiving only maintenance.

It was one of five which some centuries ago formed the single raj of Raja Singandeo Singh, who had five sons. He was the common ancestor of the families which had, since then, held the estates into which, on partition among his sons, his estate was divided. There had also been sub-division in some of the five estates. Of the five principal estates, three beside the Raj of Bhara, remained; *viz.*, Jagamanpur, Ruh Ruh, and Kakhouto. Of these, the first had been broken up into the minor estates, Tarsor, Sorawan, Bhaddek, and Hardoe; while from Ruh Ruh were stated to have been derived the minor estates, Mulhosi, Sabhad and Bukhera.

During the time when Rup Singh's brother, Ram Partab Singh, held the Raj, an allowance of Rs. 1,000 per annum was made to Rup Singh. In consequence, however, of his misconduct in 1857, during the disturbances of that year, this annuity was discontinued. A suit brought by him against the manager of the Court of Wards during the minority of the late Raja, for the recovery of arrears,

and to enforce payment of maintenance, was dismissed by the High Court in June, 1868, on the ground that the annuity had been in effect attached, by the direction of Government, on account of Rup Singh's having joined the rebels. About that time an allowance of Rs. 40 a month was made to him, out of the raj estate, increased, after the death of the Raja, by the Court of Wards to Rs. 50, with the same amount for his son.

This suit was brought on the 24th July, 1877, for possession of the Bhara Raj, on the ground that, by the ancient usage thereof, the nearest and eldest male heir, which the plaintiff was, succeeded to the exclusion of other male heirs, and of women. The widow of the late Raja, and the Collector of Etawah as manager of the Court of Wards, defended, on the ground that the alleged family usage excluding women from the succession, did not exist. It was also alleged for the defence that the plaintiff was separate in estate.

The Court of first instance was of opinion that this family was not joint and undivided in the ordinary way, but that it held the Raj of Bhara according to special family custom. The Judge, stating it to be the question whether the plaintiff had given good evidence of the existence of a custom excluding women from the succession in this family, found that he had not. On the other hand, referring to the origin of the family, he found that the evidence showed that widows were not excluded by collaterals. His judgment concluded thus:

"It appears that no instance, as far as is known, has occurred in Raj Bhara, where the Raja has died sonless, until the present time.

"But instances of this have occurred in other branches of the common family which descends from Raja Singandeo, and are adduced by defendant in support of her allegation that the *Kul-rit*, or family custom, and *Raj-rit*, or custom of the Raj, is as she alleges it to be.

"Thus, in the allied family termed Raj Ruh Ruh, it is shown that Raja Kusal Singh died, and was succeeded by his widows, Rani Chandelin and Rani Bhadaurni, although his younger brother Sambar Singh and the sons of Sambar Singh were alive.

"This Raj is not, and, as far as is ascertainable from the record, never was a separate principality, the possessor of which enjoyed

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sovereign rights. It is simply a great estate the proprietor of which has the honorific title of Raja.

"In the Tarsor estate the proprietor was called "the Lala." His wife was termed the Rani. This, it will be remembered, is one of the families of the same stock.

"In Tarsor, on the death of Parnet Singh, the widow (the then Rani) succeeded, to the exclusion of a nephew, who deposed to the fact before this Court.

"Similarly in Sorawan estate Diwan Sri Dhar's widow succeeded and still holds it.

"Both these estates are impartible, it is alleged, and in no wise (except in the title of the zamindar) differing from Bhara.

"Going out of this family stock but keeping to strictly Thakur families, there is the Chandel Thakur family of Raj Bhara, zila Mirzapur.

"Raj Bhara.—In this Raj the Raja Kesho Saran Sahai was succeeded by his widow, Rani Bed Saran Kuar, who, it was deposed, is still in possession, although male relations of the last holder exist.

"Raj Bijaigarh.—Again also in Mirzapur, the instance of the Raj Bijaigarh is quoted for the defence, where the last Raja, Ram Saran Sahai, died childless, and his Rani, Perthi Raj Kuar, succeeded, though the Raja's cousin, Lachman Saran Sahai, is alive now.

"Raj Ganga Ganj.—In Cawnpore a similar instance is given where Rani Gaurni has succeeded her deceased husband though his cousins and nephews are alive.

"Raj Rawatpur.—In Cawnpore,—Rani Baghelin similarly has succeeded and is still in possession, though many male collaterals exist.

"Other instances are given.

"On the whole I consider that defendant has clearly made out:—

"(1) That plaintiff's contention that widows never succeed to a Raj in this part of India is untrue.

"(2) That there is good evidence that in the family, to which the possessors of this estate belong, the custom is, that the widow is not excluded by collaterals.

On appeal this judgment was confirmed by the High Court (Sir R STUART, C. J., and PEARSON, J). The judgment of the latter judge referred to the succession of Kusal Singh's widows in the Ruh Ruh Raj, and stated that "the instance cited by the Raja Raghunath Singh", (who was the Ruh Ruh family representative, and a witness for the plaintiff), "so far from proving the custom alleged by him, is really an instance of widows' succeeding in preference to a niece's son." The judgment continued thus:—

"The outcome of the evidence adduced on behalf of the plaintiff is (1) the case of Arjun Singh of Purna; (2) the case of Niranjan Singh; (3) the case of Trivikram Singh of Machan.

"On the side of the defence Raja Rup Sah, rais of Jagamanpur, states that, in the five estates divided among Raja Sigandeo's sons, the custom is that in the absence of a son the widow succeeds.

"The second witness is the widow of Raja Himanchal Singh, and has recently succeeded her husband in his estate comprising 30 villages in the districts of Shâhjahânpur and Budaun, although two uncles survive him beside his widow.

"The third witness is Rao Jodha Singh of Kakhouto, to whose evidence reference has already been made in the matter of the succession to the Ruh Ruh Raj on the death of Raja Kusal Singh. This witness further deposed, in proof of a custom allowing widows to succeed their husbands, that Lala Tarnet Singh, the rais of Tarsor, died childless about 50 years ago, and that his Rani Gaurni succeeded him, and that Sri Dhar Diwan, of Sorawan, was succeeded by his widow. He also mentioned the instances of the Rani of Jhansi, and of a Rani in Anupshahr likewise succeeding.

"Kuar Roshan Singh is the fourth witness, and his evidence has already been referred to in respect of the succession to the Ruh Ruh Raj on the death of Raja Kusal Singh. The sister of this witness was the wife of Raja Partab Singh, the plaintiff's elder brother, and his mother's sister was Musammat Gaurni, the wife and successor in his raj of Tarnet Singh of Tarsor. The testimony of this

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witness is particularly valuable in consequence of his connection with the plaintiff's family; and he can hardly be mistaken about the Tarsor case. He confirms what Rao Jodha Singh said about the Sorawan case and adds that Sri Dhar's widow is still in possession. He also cites other cases in the Mirzapur and Cawnpore districts in which widows succeeded their husbands.

"The last witness, Kalandar Singh, was at one time in the female defendant's service as a karinda, and mentions, besides the Ruh Ruh, Tarsor, and Sorawan cases, two instances in the Mulhosi estate and one in the Sabhad estate in which widows succeeded their husbands. In Mulhosi, he says, Lala Lok Singh and Lala Chamna Jeo died childless and were succeeded by their Ranis; though at the time of their death, Chatter Singh, the uncle of Lok Singh, was alive. In Sabhad, Mukhut Singh has been succeeded by his widow.

"This witness also refers to the cases in the districts of Mirzapur, Cawnpore, and in Anupshahr.

"Having reviewed the evidence adduced on both sides, I consider the conclusions at which the lower Court has arrived to be warranted thereby."

On this appeal, Mr. *J. F. Leith*, Q.C., and Mr. *R. V. Doyne*, for the appellant. In the first place, the presumption is that the Bhara family continued joint, and that the raj-estate was not the separate property of the late raja. That it is impartible does not affect the rights of the appellant; for impartibility does not imply separation in estate so long as a family remains joint, nor does it cause it to be governed by the law applicable to separate succession.—*Chintamun Singh* v. *Nowluhko Konwari* (1). Secondly, the attachment of Rup Singh's allowance for maintenance did not operate to deprive him of his right as a member of the joint family. Thirdly, the remaining point is that the general law of the Mitakshara, which in the absence of proof of special custom must prevail, has not been shown to have been in this instance modified by family custom. That law, as stated in *Maharani Hiranath* v. *Ram Narayan* (2) is applicable here, *viz.*, that in a joint family to which ancestral property belongs, whether impartible or not, if that property be not separate, the succession, in the event of a holder

(1) I. L. R. 1 Calc. 153; L. R. 2 Ind. Ap. 263. (2) 9 B. L. R. 274.

dying without male issue, goes to the next collateral male heir, in preference to the widows. And it further appears from that case that there is a presumption in favour of an impartible ancestral estate descending to a male member of the joint family. That the right of the co-parcener in the case of joint estate to take by survivorship is superior to the right of the widow to inherit, is also shown by *Katama Natchiar* v. *The Raja of Shivagunga* (1); and, although the widow in that case succeeded, it was on the ground of the estate being separate; see also *Stree Raja Yanumula Venkayamah* v. *Stree Raja Yanumula Boochia Vankondora* (2).

The Court of first instance erred in ascribing a peculiar position to the estate, throwing the proof on to the plaintiff; and both Courts were wrong in concluding that the evidence sufficiently proved a custom in the family for a widow to succeed.

Reference was also made to *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (3); *Gunesh Dutt Singh* v. *Maharaja Moheshur Singh* (4); *Beer Pertab Sahee* v. *Maharaja Rajender Pertab Sahee* (5); *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (6);

Mr. *J. Graham*, Q.C., and Mr. *J. T. Woodroffe*, for the Collector of Etawah. The appellant alleged a custom of descent in the Bhara family excluding females from the succession, and this custom he failed to prove. In his plaint he did not rely on the application of the ordinary law of the Mitakshara. On the other hand, upon the general view of the evidence, two Courts have concurred in finding that, by the family custom, the widow succeeds. The law of the Mitakshara can only apply where custom is silent. The case of the Tipperah Raj—*Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (7)—shows that, in the case of an impartible raj, survivorship does not exist, as being an incident of joint ownership, inconsistently with the ownership of the raj by one person. The heir must be the one person regarded as nearest to the last holder at the time of his death; and it is submitted that this, in the present case, is the widow.

This raj, the title to which rests upon heirship, must not be assumed to be subject to the same rule of succession as ordinary

(1) 9 Moo. I. A. 539.
(2) 13 Moo. I. A. 333.
(3) 9 Moo. I. A. 66.
(4) 6 Moo. I. A. 164.
(5) 12 Moo. I. A. 1.
(6) 14 Moo. I. A. 570.
(7) 12 Moo. I. A. 523.

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ancestral estate. The nature of a raj is an exception to the general system of estates held by families under the Mitakshara. Harington's Analysis, vol. III, 329 ; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (1) ; *Gunesh Dutt Singh* v. *Maharaja Moheshur Singh* (2) ; *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (3) ; *Thakoor Jeetnath Sahee Deo* v. *Lokenath Sahee Deo* (4) were referred to. To prove the custom, the succession in Ruh Ruh was rightly referred to, the presumption being that what was the ancient usage at the time when this family was separated off, would continue to be followed. And the division of the more ancient raj was within such a period that direct connection between the families is established. On this point reference may be made to *The Marquis of Anglesey* v. *Lord Hatherton* (5) which, however, presents only a remote analogy. The appellant, in consequence of the proceedings in 1857, to which the effect of attachment was given by the High Court in 1868, ceased to be a member of the joint family. He was proclaimed a rebel, and his property was in effect confiscated. Acts XI, XIV, XV, and XXV of 1857, and IX of 1859 were referred to.

Mr. *C. W. Arathoon*, for the *Rani Baisni*.

Mr. *J. F. Leith*, Q.C., replied.

Their Lordships' judgment was delivered on a subsequent day, March 22nd, by

SIR B. PEACOCK.—This is an appeal from a decision of the High Court of Judicature for the North-Western Provinces by which a decree of the Judge of Mainpuri in favour of the defendants, the present respondents, dismissing the plaintiff's suit, was affirmed. The appellant, who was the plaintiff, sued for possession of the estate called Raj Bhara, comprising the villages and other moveable and immoveable properties specified in the schedules annexed to the plaint, by right of succession to the deceased Raja Mahander Singh, according, as stated in the plaint, "to the custom prevalent in other estates and the usage of the family of the Raja of Bhara."

The plaintiff in his plaint stated that—

"The ancient usage of the Raj of Bhara, in common with the other families of the Rajas, is that, after the decease of a Raja, his

(1) 12 Moo. I. A. 523.
(2) 6 Moo. I. A. 164.
(3) I. L. R. 1 Calc. 195.
(4) 19 Suth. W. R. 239.
(5) 10 M. and W. 218.

nearest and eldest male heir succeeds him, to the exclusion of the other male heirs and the total exclusion of women. That when Raja Mahander Singh died on the 22nd September, 1871, the revenue authorities caused the name of his widow to be recorded, notwithstanding the presence of the plaintiff, the nearest heir; that they subsequently placed the estate under the management of the Court of Wards, who fixed an allowance of Rs. 50 for the plaintiff, which he still receives."

The Rani, defendant, in her written statement stated, amongst other things, that the custom alleged by the plaintiff had no existence; that there was nothing in the history of the family of the Raja of Bhara to prove that a widow was ever deprived of the possession of the estate of her husband in the presence of the male relatives of her deceased husband; that as the property of her deceased husband was separate, she was, under the general rules of the Hindu law, entitled to enjoy it during her lifetime; that the plaintiff bore a very bad character; that he had taken arms against the Government during the mutiny, and was guilty of many atrocities; and that his property was confiscated and made over to Lala Laig Singh.

The Collector, as manager under the Court of Wards, also appeared and defended the suit. He in his written statement stated that the family custom alleged by the plaintiff did not exist; that the plaintiff and his nephew, the late Raja, were separate in estate, and that, therefore, according to the ordinary rules of Hindu law, the Rani defendant was entitled to succeed to the property of her deceased husband in preference to the plaintiff.

The Raj, although it was not proved ever to have been a principality in the strict sense of the word, or endowed with sovereign rights, was an ancient ancestral impartible estate which had always been held by a single member of the family at a time, and had passed for several generations in lineal succession according to the law of primogeniture.

Partab Singh, the father of the late Rája, Mahander Singh, was the elder brother of the plaintiff, who, as a younger brother, became entitled, according to the usage of the family, to maintenance, and for some time after the death of his father received an annuity of

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Rs. 1,000 out of the estates of the Raj. The family was joint and undivided down to the time of the Indian mutiny; but it appeared that, in consequence of the plaintiff's misconduct during the disturbances, payment of his annuity was withheld with the sanction and under the direction of Government, and that in a suit against the Manager of the Court of Wards to enforce payment during the minority of the late Raja, it was held that there had been that which, adverting to the nature of the property, was equivalent to an attachment thereof, and the suit was dismissed. There had not, however, been any adjudication of forfeiture under Act XXV of 1857, nor had any proceeding ever been taken under that Act, with reference to the estate itself.

It was contended on the part of the defendants that, in consequence of the proceedings with reference to the maintenance annuity, the legal status of the plaintiff was altered, and that he ceased to be a member of the joint family.

Their Lordships are clearly of opinion that there is no foundation for contending that the stoppage of the annuity, and the proceedings in respect thereof, amounted to a confiscation of the estate, or in any manner altered the status of the plaintiff as a member of the joint family.

The Mitakshara is the Hindu law of inheritance in the district in which the estate is situate, and it is clear that according to that law, in the absence of any special custom to the contrary, the plaintiff, as the uncle of the deceased Raja, and the surviving member of the joint family, was entitled to succeed to the ancestral estate upon the death of his nephew. According to the Mitakshara a widow is not entitled to succeed to her husband's estate in preference to collateral male heirs, unless he is separate, or, as in the Shivagunga case, his estate was separate or self-acquired (*see* Mitakshara, chap. 2, sec. 1, paras. 8—19, and 30 and 31, note).

The cases were all reviewed by the late Chief Justice of Bengal, Sir Richard Couch, in the case of *Maharani Hiranath Koer* v. *Ram Narayan Singh* (1), in which, in a careful and well considered judgment, it was held that a female cannot inherit an impartible ancestral estate belonging to a joint Hindu family, governed by the Mitakshara, when there are any male members

(1) 9 B. L. R., 274.

of the family who are qualified to succeed as heirs; that this is a rule of law not dependent on custom, and that a custom modifying the law must be a custom to admit females, not a custom to exclude them. That case was upheld by the Judicial Committee in the case of *Chintamun Singh* v. *Nowlukho Konwari* (1) and their Lordships are of opinion that it was correctly decided and is a binding authority.

In the last-mentioned case, following the decision in 13 Moore's Indian Appeals, 333 and 339, it was held that an ancestral estate, even though impartible, is not the separate or self-acquired estate of the single member upon whom it devolves, so long as the family continues joint.

In the argument before their Lordships some importance was attached by the learned counsel for the respondents to the manner in which the plaintiff's case was stated in the plaint, but their Lordships are of opinion that in dealing with the case they must look not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was treated by the lower Courts.

The following is the issue upon which the parties went to trial, *viz.*, "whether, according to the custom relied upon by the plaintiff, and under the Hindu law, the plaintiff has a right to succeed to the *gaddi*, and whether the plaintiff's character can in any way affect the suit or not." The plaint stated that "the ancient usage of the Raj of Bhara, in common with other families of the Rajas," was "that upon the decease of a Raja his nearest and eldest male heir succeeds him to the exclusion of the other male heirs, and the total exclusion of women," that is to say, that females were excluded by a male heir.

The Zila Judge in dealing with the case says: —

"Plaintiff alleges that the property in question is ancestral property belonging to a joint and undivided Hindu family governed by the law of the Mitakshara, of which he and the deceased Raja Mahander Singh were members; that by virtue of a custom prevailing in the family, the estate of the Raj of Bhara was impartible; that it was enjoyed by a single member of the family at a time,

(1) L. R., 2 Ind. Ap. 263.

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and devolved, on the death of the holder, on the eldest male heir; that Mahander Singh, the last holder, having died without male issue, he, the plaintiff, being the eldest collateral male heir, was entitled to succeed to the estate, to the exclusion of the widow of Mahander Singh. The defendant pleads —

"(1) That the custom alleged by plaintiff, whereby females are excluded from the succession, has no existence.

"(2) That the plaintiff, and his nephew, the late Raja Mahander Singh, were *separate in estate*, and were not members of a joint undivided Hindu family, and that, therefore, according to the ordinary rules of Hindu law, the Rani, defendant, was entitled to succeed to the property of her deceased childless husband in preference to the plaintiff."

He further says —

"It is admitted on both sides that the estate is impartible, and is enjoyed by a single holder at a time. It is admitted that the mode of succession is governed by special custom. The dispute is as to what that special custom is."

Ultimately he arrived at the conclusion, first, that the defendant had clearly made out that the plaintiff's contention that widows never succeed to a Raj is untrue; and secondly that there was good evidence that in the family to which the possessors of the estate belonged, the custom was that the widow is not excluded by collaterals, and he therefore dismissed the suit with costs.

Upon appeal, the High Court affirmed the decision. The Chief Justice held that there was sufficient evidence of a custom, by which the widow, failing direct descendants, was not excluded by collaterals. Mr. Justice Pearson agreed with the District Judge, and held, first, that the plaintiff's contention that widows never succeed to a raj in that part of the country is untrue; and secondly, that there was good evidence that, in the family to which the possessors of the estate in question belonged, the custom was that the widow is not excluded by collaterals.

With reference to the findings of the Zila Judge, and of Mr. Justice Pearson, that the contention of the plaintiff that widows never succeeded to a raj in that part of the country is untrue, their

Lordships fail to find that the plaintiff ever made an allegation to that effect. His allegation was that, according to the ancient usage of the Raj of Bhara, male heirs succeeded to the exclusion of females. He, no doubt, in his plaint, used the words "according to the custom prevalent in respect of other estates," and also the words "in common with the other families of the Rajas." The main allegation had reference to the usage of the Raj of Bhara, and was "that, after the decease of a Raja, his nearest and eldest male heir succeeds him, to the exclusion of other male heirs and the total exclusion of women," and that allegation was true; for the Raj of Bhara, from its earliest creation, had always descended to a male heir, and no female ever succeeded to it. The allegation made no distinction between lineal and collateral heirs, or between widows and other females.

It is not certain to what other estates or to what other Rajas the plaintiff referred, when he added the words, "in common with the other families of the Rajas;" whether he meant the Rajas of the other estates which were formerly united with Bhara, or not, is not very important; he evidently referred to other estates and Rajas similarly circumstanced, or in some way connected with the Raj of Bhara, and not to every raj in that part of the country, whether the Raja was separate, or a member of a joint family, or whether the Raj was ancestral, or self-acquired. But, however this may be, it is clear that the issue did not impose upon the plaintiff the necessity of proving that widows never, under any circumstances, succeeded to a Raj in that part of the country.

The first part of the finding, therefore, is irrelevant, and the case must be decided with reference to the question whether the Mitakshara law of succession had been so far modified by custom, with respect to the ancestral Raj of Bhara, as that, failing lineal descendants of a deceased Raja, his widow was entitled to succeed to the Raj in preference to the plaintiff, who was a collateral male heir, and the eldest male member of the joint family. No such case ever occurred in respect of the Raj of Bhara, and their Lordships are of opinion that there is no evidence to prove such a custom.

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It was contended that a case had occurred in respect of the Raj of Ruh Ruh, in which a widow had succeeded in preference to a male collateral.

The District Judge stated that the estate of Bhara was—

"One of five, all of which came from a common stock and had a common ancestor, the Raja Singandeo, who lived 650 years ago."

He proceeded,—

"The five were,—

"(1) Bhara (the property in suit).
"(2) Jagamanpur.
"(3) Ruh Ruh.
"(4) Kakhouto.
"(5) Nakkatpatti.

"The last family, Nakkatpatti, is extinct, and the second family, Jagamanpur, has split up into the families of Tarsor, Sorawan, Bhaddek, Hardoe.

"It appears that no instance, as far as is known, has occurred in Raj Bhara, where the Raja has died sonless, until the present time.

"But instances of this have occurred in other branches of the common family which descended from Raja Singandeo, and are adduced by defendant in support of her allegation that the *kul-rit*, or family custom, and *raj-rit*, or custom of the Raj, is as she alleges it to be.

"Thus, in the allied family termed Raj Ruh Ruh, it is shown that Raja Kusal Singh died, and was succeeded by his widows, Rani Chandelin, and Rani Bhadaurni, although his younger brother, Sambar Singh, and the sons of Sambar Singh, were alive."

A similar statement is made by Mr. Justice Pearson as to the origin of the five estates. He says:—"The estate in question is one of five which originally constituted a single property, and belonged to Raja Singandeo, the common ancestor of the families which have since held them separately, a partition of them having been made between his five sons."

The fact of the formation of the five separate estates by the partition of one entire estate is not disputed, and it may be assum-

ed, although not necessary to be decided, that there was such a connection between Ruh Ruh and Bhara that evidence of a custom of descent in one of them would be admissible in support of a similar custom in the others. There is, however, no evidence except in one single instance in Ruh Ruh that a female ever held any one of the other four principal estates.

With respect to that exceptional case in Ruh Ruh, the District Judge held it to have been shown that when Raja Kusal Singh died, he was succeeded by his widows Rani Chandelin and Rani Bhadaurni, although his younger brother Sambar Singh and the sons of Sambar Singh were living.

Mr. Justice Pearson also treated the case as an instance of widows succeeding in preference to a niece's son, meaning probably the son of a nephew.

It appears, however, to their Lordships that it was not a case of succession by inheritance at all.

Raja Raghunath Singh, a member of the Ruh Ruh family, and a great great grandson of the deceased Raja Kusal Singh, was examined as a witness, and stated that in his family women never sat on the *gaddi*; that upon the death of his great grandfather Kusal Singh, Himanchal Singh, his nephew's son, sat on the *gaddi*, and after him Kusal Singh, who appears from the pedigree to have been the son of a nephew of the deceased Raja.

Mr. Justice Pearson, in dealing with the evidence of this witness, says :—

"The plaintiff's witness, Raja Raghunath Singh, the representative seemingly of the Ruh Ruh branch, avers generally that females are altogether excluded from succeeding to their husbands' estates by the custom of his Raj. The only instance mentioned by him in support of his assertion is that his great grandfather Kusal Singh was succeeded by his niece's son Himanchal."

He should rather have said the son of his great nephew Ram Khaman Singh.

He proceeds :—

"His statement on this point is opposed to the evidence of Rão Jodha Singh of Kakhouto, of Kuar Roshan Singh, and of Kalandar

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Singh, witnesses on the other side, which is corroborated by two exhibits on the record, one being a copy of a proceeding of the Provincial Court at Bareilly, dated 12th April, 1813, and the other being a copy of a proceeding of the Civil Court of Mainpuri, dated 12th December, 1849. From the evidence indicated it appears that Himanchal's claim to succeed to his grandfather was based on the allegation of his having been adopted by one or both of Raja Kusal Singh's widows and was disallowed. The instance cited by Raja Raghunath Singh, so far from proving the custom alleged by him, is really an instance of widows succeeding in preference to a niece's son."

It appears from the record of the Provincial Court, referred to by the learned Judge, that Rani Bhadaurin, the widow of the deceased Raja Kusal, who is supposed to have succeeded on his death, and who was one of the defendants in an action at the suit of Himanchal, was the junior widow, and that she in her answer admitted that, after the demise of Kusal Singh (he died 1774), his estate fell under the management of the agents (*karpadazan* therein named, and that a nankar allowance was assigned by the Government (which must have been the Native Government) to her and Rani Chander Bans, the elder widow of the deceased Raja; that in the year 1195 = A.D. 1787, she caused the settlement of the estate to be made with Himanchal, who kept the accounts, and became the proprietor; that in that year losses amounting to Rs. 7,300 occurred, which she paid to the Government; that her name, with that of Sudun Singh, having been entered in the decennial register, she in 1210 Fasli = about A.D. 1802 (which was shortly after the cession of Etawah to the East India Company) caused the settlement to be made with Himanchal Singh, under the suretyship of Sudun Singh. She contended, in her answer, that under that settlement Himanchal Singh was one of her karindas, and that he having become insubordinate, she subsequently procured the second and third revenue settlements to be made with herself. Himanchal, on the other hand, contended that he had been adopted by the elder widow as the son of the deceased Raja, that the defendant, Bhadaurin, the junior widow had obtained the second and third revenue settlements by fraud, in his absence, and he sued to recover possession. The litigation commenced in 1810, and it

seems that the only issue raised between the parties was as to the validity of the alleged adoption. That issue was decided against Himanchal by the Provincial Court upon the ground that Rani Chunder Bans had no authority from her husband to adopt, and on the 12th April, 1813, it was ordered and decreed by that Court that Himanchal's suit should be dismissed. The decision of the Provincial Court was, on appeal to the Sudder Court, affirmed on the 11th of August, 1817, and it was decreed that the property in dispute should, in right of succession, descend to Kuar Ghansham Singh as the proprietor thereof. Subsequently, on the 10th of August, 1818, it was ordered that possession be given to Kuar Ghansham Singh, if he should enter into sufficient security for subscribing to the appeal to Her Majesty in Council. This he appears to have done, and the appeal was heard, and in 1834 the decree of the Sudder Court was affirmed by Her Majesty in Council, so far as it affirmed the decree of the Provincial Court of the 12th April, 1813, and reversed so far as it decreed that the landed property should, in right of succession, descend to Ghansham Singh as proprietor thereof, and had the effect of declaring him entitled to be put into possession.

It is clear from the above statement that the widows did not succeed to the Raj by inheritance, or to an impartible estate according to the rule of primogeniture, even if such a rule could be applicable to the case of two widows; on the contrary, it appears that upon the death of Kusal, the estate was put under management of *karpardazan* by the Native Government, and an allowance assigned not to the elder widow, but to the two widows jointly, probably as the guardians of Himanchal, and that subsequently the revenue settlement was made with Himanchal, and afterwards with the younger widow, Bhadaurin.

It is not clearly shown who obtained possession of the estate after the decree of Her Majesty in Council. Raja Raghunath Singh stated that Kusal Singh sat on the *gaddi* after Himanchal. This, however, is not very material, as it is clear that both the widows died before 1834, and that no other female ever obtained possession of the estate. Raja Raghunath must have been under a mistake when he stated that his grandfather's widow was living at the time when he gave his evidence.

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It is rather remarkable that the District Judge, having found that the two widows succeeded upon the death of their husband (a finding in which Mr. Justice Pearson concurred) should have considered that a descent to the two widows jointly was evidence of a custom as to descent in Bhara, which he admitted to be an impartible Raj held by only one member of the family at a time, and that one the eldest.

It was stated by Kuar Roshan Singh that the elder widow succeeded to Ruh Ruh on the death of her husband, and the younger widow on the death of the elder, but that is quite contrary to the evidence, and to the findings of the District Judge and of Mr. Justice Pearson.

In the case of *Ramalakshmi Ammal* v. *Sivanantha* (1), it was said:—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usage in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further necessary that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Their Lordships entirely concur in that doctrine, and they are clearly of opinion that there is no sufficient evidence that, even in the Raj of Ruh Ruh, a custom existed by which a widow succeeded by inheritance to the estate of her husband in preference to collateral heirs on his dying without issue.

The contention of the defendants was, that the plaintiff and the late Raja were separate, not that there was a custom for widows to inherit in preference to collaterals in the case of an undivided ancestral estate in a joint family; yet inferences were drawn in favour of such a custom by the District Judge and Mr. Justice Pearson, from descents to widows in the case of certain minor estates carved out of some of the five principal estates, such, for example, as Tarsor, Sorawan, Sabhad, and Mulhosi. Those

(1) 14 Moo. I. A. 570.

estates it was said descended to widows, though collaterals must have been living. Three of these estates were granted for maintenance. Neither Tarsor nor Sorawan was a Raj. Mulhosi was not impartible. No clear or satisfactory evidence was given that the estates were not separate estates of the last holders; whereas, if they were separate or self-acquired (which estates granted for maintenance probably would be), the widows would succeed, in due course of law, as in the *Shivagunga case* and the case of *Periasami* v. *Periasami* (1). In the only instance, as regards Sorawan, in which a widow succeeded to a minor estate created out of the Raj estate, her husband left a son, and upon a mutation the name of the son as well as that of the widow was entered. The case shows how easily witnesses may create a false impression when speaking generally of the succession of widows without showing, and probably without knowing, the circumstances under which such successions took place. Other cases, such as one in Mirzapur and another in Cawnpore, were relied on, in respect of which no connection between them and Bhara was shown to exist. Such cases, even if they could have any weight, were not admissible as evidence to prove a family custom in Bhara. (*The Marquis of Anglesey* v. *Lord Hatherton*, 10 Mees. and Welsby, 218.)

Upon the whole their Lordships are of opinion that the plaintiff made out his case satisfactorily, *viz.*, that the Raj of Bhara was an ancient Raj, and an ancestral estate, and that by virtue of an ancient custom in the family it was impartible, and to be held and enjoyed by only a single member at a time. His title then depended upon his legal right under the Mitakshara, and according to that law, the estate being ancestral, and the family undivided, he, as the nearest male heir of the deceased Raja, and the surviving member of the undivided family, was entitled to succeed to the Raj in preference to the widow. The defendants did not prove their allegation that the plaintiff and the deceased Raja were separate, as alleged by them, and it was for them to prove, by clear and unambiguous evidence, that the law of succession, according to the Mitakshara, was modified by an ancient uniform custom in favour of a widow. This, in their Lordships' opinion, they failed to do. The result is that their Lordships will humbly advise Her Majesty

(1) L. R., 5 Ind. Ap. 61.

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to reverse the decrees of both the lower Courts, and to order and decree that the plaintiff do recover possession of the estate called Raj Bhara, together with his costs in both the lower Courts.

The respondents must pay the costs of this appeal.

Solicitors for the Appellant: Messrs. *W.* and *A. Ranken Ford.*

Solicitor for the Respondent, the Collector of Etawah: Mr. *H. Treasure.*

Solicitor for the Respondent, the Rani Baisni: Mr. *T. L. Wilson.*

1884 *July* 17.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

SHIBCHARAN (PLAINTIFF) *v.* RATIRAM (DEFENDANT) *

Arbitration—Refusal of arbitrators to act—Civil Procedure Code, s. 510.

It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act; and the finality of the award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them.

Where certain matters were referred to arbitrators who refused to act, and the Court of first instance passed an order directing them to proceed and to make an award, and they, on the passing of such order, made an award,—*held* that all proceedings taken by the arbitrators in obedience to the order of the Court directing them to arbitrate against their will were null and void.

THE matters in difference in this suit were referred to three arbitrators. The arbitrators refused to act, and returned the papers which had been sent to them. The Court of first instance (Subordinate Judge) thereupon sent the papers back, directing the arbitrators to proceed and make an award within ten days. Two of the arbitrators made an award, dismissing the plaintiff's suit. The third arbitrator did not make an award. The plaintiff objected to the validity of the award upon the ground, among others, that when the arbitrators refused to act, the case should not have been returned to them, but should have been decided by the Court. This objection the Court of first instance disallowed; and gave judgment in accordance with the award. On appeal by

* Second Appeal No. 6 of 1884, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 25th September, 1883, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 10th August, 1883.

the plaintiff, the lower appellate Court (District Judge) affirmed the decree of the first Court. With reference to the objection set forth above, the Court observed that, as the agreement to refer the dispute to arbitration was uncancelled, the Subordinate Judge was well within his powers in again referring the matter to the arbitrators.

The plaintiff appealed to the High Court, on the ground (1) that the Subordinate Judge was not competent to order arbitrators to act who had refused to do so; and (2) that the award was not made within the time fixed by the Court, and no application for enlarging the period was made within time.

Mr. *J. D. Gordon* and Pandit *Ajudhia Nath*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Munshi *Sukh Ram*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and MAHMOOD, J.) delivered the following judgment :—

MAHMOOD, J.—We are of opinion that this appeal must prevail on the first ground urged before us, if not also on the second ground. It appears that after the order of reference had reached the arbitrators, they all filed a joint application stating that they did not consent to arbitrate in the case, and, with this refusal to act, they returned the papers which had been sent to them by the Court. The Subordinate Judge, instead of accepting the refusal, passed an order directing that "the record be sent back to them, and they should arbitrate and send the award within ten days from the date of the order; their refusal cannot be admitted; when the arbitrators first took this record and agreed to hold arbitration, so much so that they even obtained time from the Court, their refusal now is not free from suspicion." Upon this order being passed, the arbitrators proceeded to make the award, the legality of which is now in question, as the judgments of both the lower Courts have upheld it.

Expression has recently been given by this Court to the view, that one of the most essential principles of the law of arbitration is, that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties

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of arbitrating between the contending parties who have agreed to repose confidence in his judgment. Indeed, the finality of such award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them. This essential characteristic of the effect of such adjudications is necessarily vitiated if compulsion is employed by the Court. "Though the arbitrator has taken on himself the burden of the reference, and held several meetings, but not closed the case, he may decline to go on any further with the arbitration, and the Courts have no jurisdiction over him to compel him to proceed; nor can they order him to make his award according to a particular principle." —(Russell on Arbitration, 196). It seems that, under the Civil Law, an arbitrator might be compelled to make an award. But "it was decided in equity, by Lord Chancellor Eldon, that if arbitrators refused to proceed with a suit referred to them, the suit might be prosecuted as if no reference had been made; and, in giving judgment, Lord Eldon put it on the same footing as a case where one of the arbitrators had died."—(Russell on Arbitration, 156). This principle, and not the rule of the Civil Law, appears to have been adopted by s. 510 of our Civil Procedure Code, and therefore the learned District Judge was wrong in holding that "as the agreement to refer the dispute to arbitration was uncancelled, the Court was well within its powers in again referring the matter to arbitrators." Such is not our law; and we hold that all proceedings taken by the arbitrators in obedience to the order of the Subordinate Judge, directing the arbitrators to arbitrate against their will, were null and void. This view renders it unnecessary to consider the second ground of appeal before us. We therefore set aside the decrees of both the lower Courts and remand the case under s. 562, Civil Procedure Code. Costs in all the Courts to abide the result.

Appeal allowed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

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July 17.

BHAIRON SINGH (PLAINTIFF) *v.* LALMAN AND ANOTHER (DEFENDANTS.) *

Pre-emption—Notice to pre-emptor of projected sale—Purchase-money—Inaction of pre-emptor—Acquiescence.

The plaintiff in a suit to enforce the right of pre-emption alleged that the true consideration for the sale was less than the amount stated in the sale-deed. It was found that he made no communication to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee.

Held that the plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reasonable time, and that not having done so, he must be taken to have countenanced the completion of the bargain with the vendee, and to have waived his right of pre-emption.

THE plaintiff, who was a co-sharer in mauza Bindani, sued to enforce his right of pre-emption under the *wajib-ul-arz*, in respect of a sale by Bijai Singh to Lalman of a share in the village, under a sale-deed dated the 31st March, 1881. He alleged that the consideration for the sale was not Rs. 4,000 as stated in the deed, but that Rs. 2,152-8-0 was the true amount. Among other objections, the defendants (vendor and vendee) pleaded that the plaintiff had forfeited his pre-emptive right by having neglected to exercise it, after the defendant-vendor had giving him sufficient notice that the sale was in contemplation. The Court of first instance (Subordinate Judge) was of opinion that notice of the intended sale had not been proved, and also that the purchase-money was not Rs. 4,000 as stated in the sale-deed, but Rs. 2,152-8-0, as alleged by the plaintiff. The Court accordingly decreed the claim. On appeal the lower appellate Court (District Judge) reversed the decree. It observed that, in the appellate Court, the due receipt of notice was admitted by the plaintiff's pleader, and was otherwise sufficiently established; that the notice was shown to have been received on the 30th March, 1881, and the sale-deed, though executed, *i.e.*, engrossed, on the 31st March, was not registered until the 14th April; that this delay might reasonably be supposed to have been made in order to give the plaintiff time to interfere; but

* Second Appeal No. 1062 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 30th April, 1883, reversing a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 25th September, 1882.

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that he had taken no steps whatever to assert his claim. The Court was further of opinion that it was not incumbent upon the defendants to prove an express refusal by the plaintiff to exercise his pre-emptive right, and that when the notice of sale had been established, the burden of proving an assertion of the right was thrown upon him.

In second appeal, the plaintiff contended, first, that the lower appellate Court was wrong in treating his mere silence as an acquiescence in the sale and a waiver of his pre-emptive right; and secondly that, inasmuch as the notice of sale had specified a price disputed by him and found by the Court of first instance to be fictitious, he was justified in disregarding it. The High Court remanded certain issues for determination by the lower appellate Court, and it appeared from the findings returned upon these issues that there was no evidence to prove that the purchase-money had been falsely stated in the sale-deed.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the appellant.

Mr. *W. M. Colvin* and Pandit *Nand Lal*, for the respondents.

The Court (STRAIGHT, Offg. C.J., and BRODHURST, J.) delivered the following judgment:—

STRAIGHT, Offg. C. J.—Upon full consideration of all the circumstances of this case, and by the light of the findings returned to us upon the issues remanded, we are of opinion that the decree of the Judge, which is impeached in appeal, should be sustained. The single question for our determination is whether, after having notice of the intended sale to the respondent-vendee, the appellant's conduct was such as to warrant the inference that he either expressly or impliedly acquiesced in or relinquished his claim to pre-emption. It is found by the Judge that he made no communication whatever to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the Rs. 4,000, because it was not the consideration agreed on between the vendor and the vendee. The offer to him having come to his knowledge, as is now found, by the 30th of March, we think he was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reason-

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able time, and that, not having done so, he must be taken to have countenanced the completion of the bargain with the vendee, and to have waived his right of pre-emption. The cases referred to by the learned pleader for the appellant are not strictly analogous, for in them the pre-emptor satisfied the requirements to which we have adverted above. It seems to us, therefore, that the conclusions arrived at by the Judge were well founded, and that this appeal must be dismissed.

Appeal dismissed.

1884 *July* 21.

Before Mr. Justice Oldfield and Mr. Justice Duthoit.

MUHAMMAD HABIBULLAH KHAN (DEFENDANT) *v.* SAFDAR HUSAIN KHAN (PLAINTIFF).*

Resulting trust—Suit against trustee for possession of share, and for account and recovery of profits—Act XV of 1877 *(Limitation Act), s* 10, *sch. ii, Nos.* 62, 89 120.

M and *S* purchased certain property jointly in 1865, and had equal interests in it till 1868, when *M's* interest was reduced to one-third. *S* paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property, and for registration of the deed, and ultimately obtained possession in 1869 or 1870, and took the profits from that date. *M* did not pay any part of the money up to 1870, and it was not till 1871 that the whole of his share of it was subscribed, and he paid little or nothing towards the expenses. Subsequently he sued *S* for possession of his share, to have an account taken of the profits and to recover his share of them with future mesne profits and costs.

Held that, under the above circumstances, there was a resulting trust in favour of the plaintiff, and the defendant became liable to account to him for his share; but inasmuch as there was no express trust, and the property did not become vested in trust for a specific purpose within the meaning of s 10 of the Limitation Act, and the suit was not brought for the purpose of following such trust property in the hands of a trustee, within the meaning of the section, such suit was not one which, under s. 10, might not be barred by any length of time. *Bulwant Rao* v. *Puran Mal* (1) referred to.

Held also that No 89 of schedule ii of the Limitation Act did not apply to the suit; and that No. 62 did not meet a claim like the present relating to an equitable claim against a trustee liable to account, in which the relief sought was to have an account taken of the trust property, and to recover what might be due. *Guru Dass Pyne* v. *Ram Narain Sahu* (2) referred to.

Held also that No 120 of schedule ii of the Limitation Act applied to the suit, as it was one for which no period of limitation was provided elsewhere in the schedule.

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* First Appeal No. 57 of 1882, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 27th February, 1882.

(1) I. L. R., 6 All. 1. (2) L. R., 11 Ind. Ap. 59; I. L. R, 10 Calc. 860.

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THE plaintiff in this case sued for possession of a one half share of certain property which had been purchased jointly by himself and the defendant in 1865; to have an account taken of the profits; and to recover his share of them to the amount of Rs. 15,000, with future mesne profits and costs. The purchase-money was paid, in the first instance, by the defendant, with whom the property, from the time when possession of it was obtained in 1869 or 1870, remained, and who, according to the plaintiff, held the half share in trust for him. In 1877, when the plaintiff demanded an account and share of the profits, the defendant denied his right to more than one-third of the property. In 1880, the defendant refused to come to any arrangement. He alleged that the plaintiff had promised to pay his share of the purchase-money and of the expenses incurred in obtaining possession of the property, or, in default, to relinquish his claim, and that, having failed to make such payment, he had now forfeited the one-third share.

There were between the parties various issues of fact, to which it is not necessary to refer at length. The Court of first instance found that the parties had joined in making the purchase; that the plaintiff's share was originally one-half, but that he had relinquished a portion in 1868, his share being thus reduced to one third; that the defendant held this one-third share in trust for the plaintiff with a liability to account for it to him; that the plaintiff did not bind himself to relinquish the share upon failure to make certain payments; and that he was entitled to a third of the profits which the defendant had received.

One of the pleas set up by the defendant was that the claim was barred by limitation. The learned Judge was of opinion that the limitation applicable to the claim for account and profits was that provided by sch. ii., art. 120 of the Limitation Act, and that the suit being brought within six years from the accrual of the cause of action in 1880, when the defendant first denied the plaintiff's right to the one-third share, the plea of limitation failed.

On appeal to the High Court, it was contended for the defendant that the learned Judge was wrong in treating him as a trustee in respect of the property; that the limitation applicable to the case was not art. 120, but art. 62, or possibly art. 89; and that

the plaintiff could only claim profits for three years, and the claim had become barred.

Mr. *T. Conlan*, Mr. *G. T. Spankie*, Munshi *Hanuman Prasad* and Shaikh *Mehdi Hasan*, for the appellant.

Mr. *G. E. A. Ross*, Pandit *Bishambhar Nath*, the *Senior Government Pleader* (Lala *Juala Prasad*), and Pandit *Nand Lal*, for the respondent.

The Court (OLDFIELD and DUTHOIT, JJ.) delivered the following judgment:—

DUTHOIT J. (After stating the facts, continued:)—With regard to the appeal on behalf of defendant in respect of the character in which defendant held the property, it seems clear that the plaintiff and defendant joined in the purchase in 1865, and each had equal interests in the properties until 1868, when the plaintiff's interest was reduced to one-third. The defendant paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property, and for registration of the deed; and ultimately obtained possession in 1869 or 1870, and took the profits from that date. The plaintiff does not appear to have paid any part of the money up to 1870; he subsequently paid Rs. 3,500, and it was not till 1871 that the rest of his share of it was subscribed; and he seems to have paid little or nothing towards the expenses.

Under the above circumstances, there was a resulting trust in favour of the plaintiff, and the defendant became liable to account to the plaintiff for his share; but there was no express trust; the property did not become vested in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, nor is this suit brought for the purpose of following such trust property in the hands of a trustee within the meaning of the section. Their Lordships of the Privy Council have ruled that the section applies to suits for the purpose of recovering the property for the trusts in question, and that when property is used for some purpose other than the proper purpose of the trusts, it may be recovered, without any bar of time, from the hands of the persons indicated in the section.—*Bulwant Rao* v. *Puran Mal* (1). This suit is not

(1) I. L. R., 6 All., 1

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therefore one which, under s 10, may not be barred by any length of time.

The Judge has applied to it the limitation of art. 120, so far as it is a suit for account, and recovery of the money found to be due. On the other hand, it is contended for the defendant that either art. 89 or art. 62 of the Limitation Act (XV of 1877) is applicable.

In our opinion, the former article is not applicable, for no relation of principal and agent can be said to subsist between the plaintiff and the defendant, nor do we consider art. 62 to apply. That article refers to suits for money payable by the defendant to the plaintiff for money received by the defendant; for the plaintiff's use, but it does not meet a suit like this relating to an equitable claim against a trustee liable to account, in which the relief sought is to have an account taken of the trust property and to recover what may be due. The form in which the suit is brought is not that of an action for money had and received for the plaintiff's use, and the latter class of suit would not afford a sufficient relief.

We may refer to the case of *Guru Doss Pyne* v. *Ram Narain Sahoo* (1) decided by the Privy Council on the 21st February, 1884, in support of the view of art. 62 which we take. The plaintiff in that case had obtained a decree for money against the widow of one Modhosadan as representing the latter, on account of the value of timber converted by Modhosadan to his use. Some property of Modhosadan's brother was attached, and the plaintiff instituted the suit to try his right to recover the amount of his decree by sale of the property, on the ground that Modhosadan's brother had misappropriated the proceeds of the sale of the timber. Their Lordships held that art. 60, Act IX of 1871, which corresponds to art 62, Act XV of 1877, was inapplicable to the suit, which they observe was "to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the defendant, to make him responsible for the amount;" and they held that the suit came within art. 118, Act IX of 1871, which corresponds with art. 120, Act XV of 1877.

(1) L. R, 11 Ind. Ap. 59; I. L. R., 10 Calc. 860.

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In the same way, an equitable claim of the nature of the present will not fall under art. 62, but under art. 120 of the Limitation Act, and the Judge was right to apply that article, as the suit is one for which no period of limitation is provided elsewhere in the schedule.

[Other matters dealt with in the judgment are not material to the purposes of this report. The case was remanded to the lower Court for the determination of certain questions of fact.]

Cause remanded.

CRIMINAL REVISIONAL.

1884 *July* 22.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* DUNGAR SINGH AND ANOTHER.

Convictions of rioting and causing grievous hurt—Offences distinct—Separate sentences not illegal—Criminal Procedure Code, ss 35, 235—*Act VIII of* 1882, *s.* 4—*Act XLV of* 1860 (*Penal Code*), *ss.* 147, 325.

The offences of rioting, of voluntarily causing hurt, and of voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences within the meaning of s. 35 of the Criminal Procedure Code.

Under the first paragraph of s. 235 of the Criminal Procedure Code, a person accused of rioting and of voluntarily causing grievous hurt may be charged with and tried for each offence at one trial, and, under s. 35, a separate sentence may be passed in respect of each. *Queen-Empress* v. *Ram Partab* (1) dissented from.

The facts of this case are sufficiently stated in the judgment.

Mr. *C. Dillon*, for the applicants.

The *Public Prosecutor* (Mr. *G. E. A. Ross*, for the Crown.

BRODHURST, J.—In this case Dungar Singh, Chunni Singh, and five other accused persons were tried by the Deputy Magistrate of Pilibhit for the offences of rioting and causing grievous hurt, punishable respectively under ss. 147 and 325 of the Indian Penal Code. Dungar, Chunni, and one Nathu Khan were convicted and sentenced to six months rigorous imprisonment under s. 147, and were also convicted under s. 325, and were each sentenced to a further term of six months' rigorous imprisonment.

(1) I. L. R., 6 All. 121.

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The remaining four persons were each sentenced to six months' rigorous imprisonment under s. 147.

The prisoners preferred appeals which were dismissed by the Sessions Judge, and Dungar and Chunni have each now presented an application to this Court for revision of the orders of the lower Courts. Four objections to these orders were taken; three of them are now abandoned by the applicants' learned counsel; and the fourth and remaining one is:—"Because, under a ruling of this Hon'ble Court, separate sentences under ss. 147 and 325, Penal Code, are illegal." I have therefore to decide whether this plea is valid or not.

In the ruling referred to, *Queen-Empress* v. *Ram Partab* (1), Mr. Justice Straight after coming to the conclusion that the appeal must be dismissed on the merits, continued:—"But it is incumbent upon me now to consider the further question of whether under the double convictions of the appellant, under ss. 147 and 325 of the Penal Code, the separate sentences of one year and two years' rigorous imprisonment respectively were legally passed I concede at once that by the first clause of s. 235 of the Criminal Procedure Code, it was competent for the Judge to try him, in a single trial, for the offences of riot and causing grievous hurt;" and my learned colleague, towards the end of his judgment, observed:—"So in the present case the appellant was a member of an unlawful assembly; he participated in a riot, and, in the course of such riot, grievous hurt was caused by persons other than himself, for which he was responsible in law, as if his own hand had inflicted it, by reason of his being a member of an unlawful assembly of which they also were members. It was permissible to try and convict him for riot and for causing hurt or grievous hurt, as the case might be, in respect of each person assaulted, subject, of course, to the limitations of s. 234 of the Criminal Procedure Code as to the number of charges joined; but while he might be punished for the riot or upon each of the charges of grievous hurt separately, I do not think that different sentences can be passed for the riot and in respect of each of such other charges as well. In my opinion the riot is a part of those other

(1) I. L. R., 6 All. 121.

offences, the force or violence incident to their commission converting what would otherwise have been a mere unlawful assembly into a riot. In this view of the matter, I hold that the sentence passed upon the appellant under s. 147 should be quashed, and as I think the two years' rigorous imprisonment, imposed under s. 325 of the Penal Code, meets the requirements of justice, I consider it unnecessary to make any further orders."

I will notice one or two other rulings of this Court under the same or similar sections of the Penal Code, and will then state my own opinion as to the law on the subject.

In the case of the *Queen* v. *Hurgobind* (1) the prisoners, who had been convicted under ss. 148, 304, and 326 of the Penal Code, and had each been sentenced to rigorous imprisonment for three years under s. 148, to five years under s. 304, and to two years under s. 326, or in the aggregate to ten years' rigorous imprisonment, appealed against these convictions and sentences, and Turner, J., (now Chief Justice of the High Court at Madras), in disposing of the appeal, observed: "Then it is said, the appellants cannot be convicted of rioting, armed with deadly weapons, and of committing culpable homicide and grievous hurt. The facts established show that these appellants engaged in a riot, armed with deadly weapons; that in the prosecution of the common object of the assembly, one man was killed and several severely wounded. With every respect for the opinion of the learned Judges who decided the case of *R.* v. *Rabi-ulla* (2), I cannot assent to the ruling that, under such circumstances as exist in this case, the appellants cannot be convicted of the three several offences. A different view of the law has heretofore obtained in this Court. The sentence is collectively severe, but not so much out of proportion to the offence that I feel justified in interfering. The appeal is dismissed."

The above-mentioned judgment was delivered when Act XXV of 1861 was the Code of Criminal Procedure in force, but a more recent ruling by Pearson, J., in *Empress* v. *Ram Adhin* (3), is to the same effect. In that case, eight persons, who had been separately charged with, convicted of, and punished for

(1) N.-W. P. H. C. Rep., 1871, p. 174. (2) 7 W. R. Cr. 13.
(3) I. L. R., 2 All. 139.

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offences under s. 147 and 323 of the Penal Code, by the Magistrate, and whose sentences had, on appeal, been affirmed by the Sessions Judge, presented an application to this Court for revision of the order above-mentioned, and their learned counsel contended that they could not be punished both for the offence of rioting and for that of voluntarily causing hurt. Pearson, J., in the course of his judgment, remarked:—"It appears that in the case of *Queen* v. *Hurgobind* (1) decided by this Court on 7th July, 1871, Turner, J., held that persons found guilty of rioting may, if the circumstances warrant it, be convicted of the several offences of rioting, armed with deadly weapons, culpable homicide, and grievous hurt. The learned Judge referred to the case of *Rabi-ulla* (2) mentioned above, and expressed his dissent from the ruling therein, and observed that a different view of the law had heretofore obtained in this Court. It further appears that the learned Judges of the Calcutta Court, who disposed of *Rabi-ulla's case*, ruled in a different direction in the case disposed of by them in the following month of April. On the whole, the precedents which have been produced are opposed to the contention in this case. It is obvious to remark that rioting and unlawful assembly are offences against the public tranquillity, while assault, hurt, &c., are offences affecting the human body. Seeing no sufficient reason for interference, I reject this application."

The then law on the subject was contained in para. 1, s. 454, Act X of 1872, and if any doubt could possibly be entertained as to the meaning of that paragraph, it would have been removed by referring to *Illustration (f)*, which clearly shows that an accused person might be separately charged with, convicted of, and punished for offences under ss. 147, 323, and 152 of the Penal Code.

For many years past, the Sessions Judges and Magistrates of these Provinces have constantly decided such cases in accordance with the above and similar rulings, and a very large number of their judgments has undoubtedly been affirmed by this Court, on appeal and in revision.

That accused persons could, during the ten years and more that Act X of 1872 was in force, be separately charged with, con-

(1) N.-W. P. H. C. Rep., 1871, p. 174. (2) 7 W. R., Cr. 13.

victed of, and punished for the offences under ss. 147 and 325 of which the applicants in the present case have been convicted and sentenced, appears to be indisputable, and all that remains now to be seen is whether any change on this point has been effected by Act VIII of 1882, or by Act X of 1882, which came into force on the 1st January, 1883.

S. 235 of Act X of 1882 is the corresponding section to s. 454 of Act X of 1872. The wording of para. 1, s. 235 of the new Code, differs slightly from the wording of para. 1, s. 454 of the late Code, but the meaning of the two paragraphs is precisely the same, and *Illustration* (*g*) to para. 1, s. 235 of Act X of 1882 is almost word for word the same as *Illustration* (*f*), para. 1, s. 454 of Act X of 1872. *Illustration* (*g*) shows that a person may still be separately charged with, and convicted of, offences under ss. 147, 325, and 152 of the Indian Penal Code; but the word "punished" is not to be found in the new illustration as it was in *Illustration* (*f*) above referred to in the Code lately repealed. The word "punished" has apparently been omitted from all the illustrations in the new Code, and the reason of this is explained by Mr. Mayne on page 43 of the twelfth edition of his *Commentaries on the Indian Penal Code*, as follows:—

"This section (235 of Act X of 1882), combined with s. 71 of the Penal Code, seems to reproduce the provisions of the former Criminal Procedure Code (Act X of 1872), s. 454. The omission of all those references to punishment in the section itself and in the illustrations which were contained in the repealed s. 454, shows that it is to be treated merely as containing rules for criminal pleading and procedure, and that the rules as to assessment of punishment must be sought for in s. 71 of the Penal Code, as amended by Act VIII of 1882, and in the Criminal Procedure Code, s. 35, *ante*, pp. 34-42."

S. 71 of the Penal Code did not affect para. 1, s. 454, Act X of 1872, and s. 71, as amended by s. 4, Act VIII of 1882, does not in any way affect para. 1, s. 235 of Act X of 1882, so that an accused person can still, as before, be separately tried, convicted, and punished for offences under ss. 147, 325 and 152 of the Indian Penal Code. Reading s. 71 of the Penal Code as amen-

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ded by s. 4 of Act VIII of 1882 with s. 235 of Act X of 1882, the law on the subject is the same as it was when Act X of 1872 was in force. Portions of paragraphs 2 and 3 of s. 454, Act X of 1872, contained matter of substantive law, and they were, therefore, when the Criminal Procedure Code was re-enacted, omitted from that Code, and were by s. 4, Act VIII of 1882, placed in the Penal Code.

By s. 35 of the Criminal Procedure Code it is enacted:

"When a person is convicted, at one trial, of two or more distinct offences, the Court may sentence him for such offences to the several punishments prescribed therefor which such Court is competent to inflict: such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct.

It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court.

Provided as follows:—

(*a*) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years.

(*b*) if the case is tried by a Magistrate (other than a Magistrate acting under s. 34) the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict."

The offence of rioting, and the offences of voluntarily causing hurt and voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences. The offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the two other mentioned offences. If then a person is accused of having committed the offence of rioting armed with a deadly weapon, and also with having at the same time committed the offences of voluntarily causing hurt to one person, and of voluntarily causing grievous hurt, by means of a dangerous wea-

pon, to another person, he may, under the provisions of para. 1, s. 235 of the Criminal Procedure Code, be charged with and tried, at one trial, for each of the three above-mentioned offences; and, in my opinion, he may, under the provisions of s. 35 of the Criminal Procedure Code, be sentenced to three years rigorous imprisonment under s. 148 of the Penal Code, to one year's rigorous imprisonment under s. 323, and to ten years' rigorous imprisonment under s. 326, or to an aggregate punishment of fourteen years' rigorous imprisonment. This appears to me to be not only in accordance with the law, but also with common sense.

A. commits a most aggravated assault on B., causing bone fractures and other very serious injuries, and conducts himself generally in such a way as to render any punishment less than the maximum amount of seven years' rigorous imprisonment that can be awarded under s. 325 of the Penal Code, inadequate. In another case C., a zamindar, collects two hundred men and arms them with *lathis*, spears, and *tulwars* in order to eject D., a neighbouring landholder, from a certain portion of his land, and to take it into his own possession. C. and his followers thus become members of an unlawful assembly; when the members of this unlawful assembly proceed to D.'s land, which he is having ploughed, and stop and unyoke the bullocks, they, having thus committed "force," are guilty of the offence of rioting armed with deadly weapons. C., on being remonstrated with by D., for bringing the members of the unlawful assembly on to his land and stopping his ploughing, assaults D. and commits grievous hurt of a similar nature to that above described in the case of B. C. would, equally with B., be deserving of the maximum term of imprisonment under s. 325 of the Penal Code, and C., having in addition to the serious offence affecting the human body that he is guilty of, committed another grave offence against the public tranquillity, and having caused alarm to women, children, and other peaceably disposed persons within a large tract of country, obviously ought not to go unpunished for the offence of which he is guilty under s. 148 of the Penal Code.

The Deputy Magistrate's decision is in accordance with the vast majority of the rulings of this Court for many years past. It is, moreover, in accordance with the judgments of the majority

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of the Judges of this Court ever since Act X of 1882 came into force. It is also, in my opinion, in conformity with the law, and is otherwise unobjectionable. I therefore decline to interfere, and I reject the application.

Application rejected.

APPELLATE CIVIL.

1884 *July 23.*

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

NATH MAL DAS AND OTHERS (DEFENDANTS) *v.* TAJAMMUL HUSAIN (PLAINTIFF).

Civil Procedure Code, s 244—Question for Court executing decree—Plaintiff suing in a character separate from that in which decree was passed against him—Separate suit not barred.

A judgment-debtor, upon the attachment of certain land in execution of decrees passed against him personally by the Revenue Court, instituted a suit for a declaration and establishment of his right to such land, not as his own property but as *wakf*, of which he was *mutawalli* or trustee.

Held that inasmuch as the plaintiff was not suing in his own right, but in his capacity as custodian, trustee, or manager of the *wakf* property, and he must therefore be taken to fill a character separate from that in which the decrees were passed against him by the Revenue Court, his suit was not barred by the provisions of s 244 of the Civil Procedure Code. *Madho Prakash Singh* v. *Murli Manohar* (1) and *Shankar Dial* v. *Amir Haidar* (2) referred to.

THE appellants, in execution of decrees passed by the Revenue Court against the respondents personally, attached certain land. The respondent objected on the ground that the land was not liable to attachment, as it was *wakf* under his father's will. The objection was disallowed by the Revenue Court, presumably under s. 179 of the N.-W. P. Rent Act (XII of 1881), on the 4th of June, 1883. The present suit for a declaration and establishment of right to the land in question was subsequently instituted by the respondent, not in his own right, but as *mutawalli* or trustee of the *wakf* property.

The Court of first instance (Subordinate Judge) decreed the claim on the ground that the property was the subject of *wakf*, and therefore not liable to attachment or sale in execution of a decree against the plaintiff personally.

* First Appeal No. 16 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 14th September, 1883.

(1) I. L. R., 5 All. 406. (2) I. L. R., 2 All. 752.

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On appeal to the High Court, it was contended, *inter alia*, that this being a question arising between the parties to the suit in which the original decree was passed, and relating to the execution of the decree, it should, with reference to s. 244 of the Civil Procedure Code, be settled in the execution department, and not by a separate suit.

Munshi *Hanuman Prasad* and Lala *Harkishen Das*, for the appellants.

Mr. *Amir-ud-din* and Babu *Baroda Prasad*, for the respondent.

The Court (MAHMOOD and DUTHOIT, JJ) delivered the following judgment:—

MAHMOOD, J.—In the appeal before us, the learned pleader for the appellants has laid the greatest stress on the contention that the suit was not maintainable by the plaintiff, as he was the judgment-debtor of the decrees in execution whereof the property was attached. For this contention, s 244 of the Civil Procedure Code is relied upon, on the ground that the Courts of Revenue, in those matters of procedure on which the Rent Act is silent, have been held by a Full Bench of this Court in *Madho Prakash Singh* v. *Murli Manohar* 1) to be governed by the principles of the Civil Procedure Code.

We are, however, of opinion that the suit was maintainable. The plaintiff in this suit is not suing in his own right, but in his capacity as custodian, trustee, or manager of the *wakf* property, and he must therefore be taken to fill a character separate from that in which the decrees were passed againt him by the Revenue Court. S. 244 of the Civil Procedure Code does not, therefore, bar the present suit, and the view which we have taken is supported by the principle laid down in *Shankar Dial* v. *Amir Haidar* (2) and in the cases there cited. The legal objection therefore has no force.

(The Court proceeded to consider the findings of the Court of first instance upon the merits, and, holding that no grounds for disturbing these findings had been established, dismissed the appeal with costs.)

Appeal dismissed.

(1) I. L. R., 5 All. 406. (2) I. L. R., 2 All. 752.

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July 28.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

FIDA HUSAIN AND ANOTHER (PLAINTIFFS) *v.* KUTUB HUSAIN (DEFENDANT).*

Execution of decree—Decree for money—Property not attached—Such property not sold in execution—Submersion of contiguous estate—Alluvion.

F owned a share in a village *M*, which in 1875 was divided into two separate mahals, *K* and *U*, and Government revenue was separately assessed on each mahal. In 1876, *K* was entirely submerged by the Ganges. On the 20th September, 1877, *F*'s share was sold in execution of a decree, and the auction-purchaser was put in possession. In the sale-certificate, the village *M* was named, without specific mention of either of the two mahals, and the Government revenue referred to was the amount assessed on *U* only. Subsequently the river receded, and part of *K* was again left dry, and it was treated by the revenue authorities as having accreted by alluvion to *U*, in the proprietary possession of the auction-purchaser.

Held that this view was erroneous inasmuch as, before the auction-sale of 20th September, 1877, the two properties were separate, being separately assessed with revenue, and the incidents of the ownership of one could not affect the ownership of the other; and since there was no such rule of law as would justify the proposition that simply because two mahals are contiguous, and one of them is liable to be submerged, therefore it is nothing more or less than an accretion to the other.

Held also that inasmuch as the mahal *K*, being at the time under water, was not attached in execution of the decree against *F*, and was not advertized for sale, and the revenue assessed thereon was not referred to in the sale-proceedings, and the sale certificate contained no reference to it as the property sold, the sale of the 20th September, 1877, did not convey any rights to the auction-purchaser in respect of *K*. *Mahadeo Dubey* v. *Bhola Nath Dichit* (1) referred to.

ALI Bakhsh, father of the plaintiff in this suit, Fida Husain, owned a two annas share in mauza Mustafabad, and in 1875 the village was divided into two separate mahals, one being called "Uparwar" and the other "Kachar," and Government revenue was separately assessed on each. In 1876, the Kachar mahal was entirely submerged by the river Ganges. On the 20th September, 1877, the share of the plaintiff's father in Mustafabad was sold in execution of a simple money-decree, and the auction-purchaser was put in possession. In the sale-certificate Mustafabad was named, without specific mention of either of the two mahals, and the Government revenue referred to was the amount assessed on the Uparwar mahal

* Second Appeal No 16 of 1884, from a decree of F. S. Bullock, Esq., Offg District Judge of Allahabad, dated the 12th September, 1883, affirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 16th July, 1883.

only. In 1879 and 1880, the river having to some extent receded, part of the Kachar mahal was again left dry, and it was treated by the revenue authorities as having accreted by alluvion to the Uparwar mahal in proprietary possession of the auction-purchaser. The plaintiffs (Fida Husain and one Mir Khan to whom he had sold half of the property in dispute) thereupon instituted the present suit for the recovery of this land, and the whole question between the parties was, whether the sale of the 20th September, 1877, conveyed the share of Ali Bakhsh in the Uparwar mahal only, or also his rights and interests in the Kachar mahal.

The Court of first instance (Munsif of Allahabad) and the lower appellate Court (District Judge of Allahabad) concurred in dismissing the suit, on the ground that the sale conveyed the rights and interests of Ali Bakhsh in both the mahals. The lower appellate Court, in arriving at this conclusion, relied principally on the circumstance that, at the time of the sale, the Kachar mahal was under water, and that, therefore, besides the Uparwar mahal, "there was no other mahal in existence at the time of the sale. No mahal Kachar existed, or it would inevitably have been sold."

The plaintiffs appealed to the High Court, contending that the mahal Kachar had not been conveyed by the sale of the 20th September, 1877, and should not be treated as an accretion by alluvion to the estate of the adjacent proprietor.

Mr. *Amir-ud-din*, for the appellants.

Pandit *Ajudhia Nath*, Shaikh *Maula Bakhsh* and Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment :—

MAHMOOD, J.—It is clear to us that the question in this case is not what might have been sold, but what was *actually* sold. And upon this question there can be no doubt. There is nothing to show (and indeed it is not seriously maintained) that the Kachar mahal was ever actually attached or advertized for sale, and the only explanation given is that it was under water at the time. The explanation, however, far from supporting the defence, strengthens the plaintiff's case. The two mahals were made into separate

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properties in 1875, and it is admitted that during the sale-proceedings, in describing the shares to be sold, the revenue assessed on the Uparwar mahal only was mentioned. Such is the case in the sale-certificate itself, which is the basis of the defendant's title Yet the Courts below have allowed the defendant more than his title-deed includes, apparently on the ground that although the two mahals were separate properties, yet the ownership of the Kachar depended upon the ownership of the Uparwar mahal, the latter being regarded as the main property, and the former as accretion to it. But such a view is clearly erroneous in law. Before the auction-sale of the 20th September 1877, Ali Bakhsh could have sold his share in the Kachar, and kept his share in the Uparwar mahal, and *vice versâ*. The two properties were separate, being separately assessed with revenue, and the incidents of the ownership of one could not affect the ownership of the other. There is no such rule of law as would justify the proposition that simply because two mahals are contiguous, and one of them is liable to be submerged, therefore the former is nothing more or less than an accretion to the other. Yet such seems to be the view upon which the judgments of the lower Courts proceed. The ownership of property cannot pass without a valid legal conveyance or other incident of law which has the same effect. Here the plaintiff's father, Ali Bakhsh, was admittedly the owner of the two annas share in the Kachar mahal, and the plaintiff Fida Husain, as his legal heir, has inherited it. The only fact relied upon by the defendant for proving that the ownership has passed to him is the auction-sale of the 20th Septmber, 1877, which, as we have already said, did not include the share in the Kachar mahal now in dispute.

In the case of *Mahadeo Dubey* v. *Bhola Nath Dichit* (1) a Full Bench of this Court laid down the rule that "a regularly perfected attachment is an essential preliminary to sale in execution of simple money decrees, and that where there has been no such attachment, any sale that may have taken place is not simply voidable, but *defacto* void." In the present case, the Kachar mahal, being at the time under water, was not attached, it was not advertized for sale, the revenue assessed thereon was not referred to in the sale-proceedings, and the sale-certificate itself contains no reference to it as the pro-

(1) I. L. R., 5 All. 86.

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perty sold ; but, on the contrary, the share sold is described as paying the amount of revenue assessed on the share of Ali Bakhsh in the Uparwar mahal only. We are therefore unable to agree with the lower Courts in holding that the sale of the 20th September, 1877, conveyed any rights to the defendant in the Kachar mahal, and, the title of the plaintiff being admitted, we decree the appeal, reversing the decrees of both the lower Courts. Costs in all the Courts will be paid by the defendant-respondent.

Appeal allowed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

1884 *July* 28.

HARIHAR DAT (PLAINTIFF) *v.* SHEO PRASAD AND OTHERS (DEFENDANTS).*

Pre-emption—Acts or omissions by pre-emptor's authorized agent binding on pre-emptor.

It is a general rule of pre emption that any act or omission on the part of a duly authorized agent or manager of the pre emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself.

THE plaintiff in this suit, which was one to enforce the right of pre-emption, had been living in Nepaul for sixteen years, leaving the property upon the ownership whereof his pre-emptive claim was based under the management of his son Kantika Prasad. The latter was found by both the lower Courts (Subordinate Judge and District Judge of Benares) to have relinquished pre-emption by acquiescing in the sale to which the present suit related. The plaintiff appealed from this decision. Upon remand by the High Court, it was found by the lower appellate Court that "Kantika Prasad's position with regard to his father's share was such as to legally warrant his buying or selling on his father's behalf." No objection to this finding was preferred by the plaintiff-appellant under s. 567 of the Civil Procedure Code.

Mr. *Simeon* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Mr. *T. Conlan* and Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondents.

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* Second Appeal No. 1199 of 1883, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 31st May, 1883, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 15th March, 1883.

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The Court (STRAIGHT, Offg. C. J., and MAHMOOD, J.) delivered the following judgment:—

MAHMOOD, J.—It is a general rule of pre-emption that any act or omission on the part of a duly authorized agent or manager of the pre-emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself. The refusal of Kantika to purchase the property now in suit therefore debars the plaintiff from maintaining the present suit. The appeal is dismissed with costs.

Appeal dismissed.

1884 *July* 29.

CIVIL REVISIONAL.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

GULAB RAI (PETITIONER) *v.* MANGLI LAL (OPPOSITE PARTY) *

Civil Procedure Code, ss. 2, 54 (c), 582, 622—"Decree"—Order rejecting plaint—Plaint held to include memorandum of appeal—Order rejecting appeal—Act XV of 1877 (*Limitation Act*), *s.* 4.—*High Court's powers of revision.*

An order rejecting a memorandum of appeal as barred by limitation is a "decree" within the meaning of s. 2 of the Civil Procedure Code; it is therefore appealable, and not open to revision by the High Court under s. 622 of the Code.

Gajraj Singh v. *Bhagwant Singh* (1) and *Dianatullah Beg* v. *Wajid Ali Shah* (2) distinguished.

THE facts of this case are sufficiently stated in the judgment.

Babu *Jogindro Nath Chaudhri*, for the petitioner.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the opposite party.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

MAHMOOD, J.—This is an application under s. 622 of the Civil Procedure Code, for revision of an order of the District Judge rejecting an appeal as barred by limitation. The learned Pandit who has appeared on behalf of the opposite party has raised a preliminary objection that the order of the District Judge was a "decree" within the meaning of s. 2 of the Civil Procedure Code;

* Application No 117 of 1884, for revision under s 622 of the Civil Procedure Code of an order of T. B. Tracy, Esq, Officiating District Judge of Bareilly, dated the 4th January, 1884.

(1) Weekly Notes, 1883, p. 255. (2) I. L. R., 6 All. 438.

that it was appealable, and could not, therefore, be made the subject of revision.

There can be no doubt that "an order rejecting a *plaint*" is treated by the Code as a "decree," under the express words of s. 2, and the learned Pandit contends, that with reference to the provisions of the last paragraph of s. 582, the word "plaint," as used in s. 2, must be understood to include memorandum of appeal. He further contends that the first part of the definition of "decree" given in s. 2 is sufficiently broad to include orders such as the one now under consideration.

On the other hand, the learned pleader for the petitioner relies upon a ruling of a Division Bench in *Gajraj Singh* v. *Bhagwant Singh* (1), in which Stuart, C. J., and Tyrrell, J., held that an order rejecting a memorandum of appeal, for failure of the appellant to supply the deficiency of stamp, was not appealable as a decree. The case, however, is not on all fours with the present case, and whatever view we ourselves might have taken in that case, we do not regard it as governing the question now before us, though the *ratio decidendi* bears upon this case. The power exercised by the Judge in that case could have been exercised only under s. 54 (*b*), read with the last part of s. 582 of the Code, and the proposition of law laid down in that case may seem doubtful, but we are not directly concerned with the point decided in that case.

In the Civil Procedure Code there is no separate provision which allows the appellate Court to "reject" a memorandum of appeal on the ground of its being barred by limitation. S. 543 is limited to cases in which the memorandum of appeal is not drawn up in the manner prescribed by the Code, and it is only by applying s. 54 (*c*), *mutatis mutandis*, (as provided by the last part of s. 582), to appeals that the Code can be understood to make provision for rejection of appeals as barred by limitation. However, s. 4 of the Limitation Act clearly lays down that every "appeal presented after the period of limitation prescribed therefor shall be *dismissed*." It is therefore clear that the order of the District Judge in this case must be taken to be one which falls under the

(1) Weekly Notes, 1883, p. 255.

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GULAB RAI v. MANGLI LAL.

definition of "decree" within the meaning of s. 2 of the Code, as the order, so far as the Judge was concerned, disposed of the appeal. We do not think any other view can give effect to the provisions of the Code, for we cannot hold that the Legislature intended such orders to be final.

The learned pleader for the petitioner, however, contends that the view which we have taken is inconsistent with the *ratio decidendi* of a recent ruling of this Court in *Dianatullah Beg* v. *Wajid Ali Shah* (1) to which one of us was a party. But the point decided in that case was different to the one now before us, and the question of interpretation there related to the language of the Limitation Act, and not to that of the Civil Procedure Code.

The order to which this application for revision relates was, therefore, appealable, and cannot be dealt with by this Court in revision under s. 622 of the Civil Procedure Code. The application is dismissed with costs.

Application rejected.

CRIMINAL REVISIONAL.

1884 *July* 31.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* GHULET AND ANOTHER.

Criminal Procedure Code, sch. V., No. XXVIII (4)—Alternative charges—Act XLV of 1860 (Penal Code), s. 193—False evidence—Contradictory statements—Assignment of false statement not necessary.

In a charge under s. 193 of the Penal Code, it is not necessary to allege which of two contradictory statements upon oath is false, but it is sufficient (unless some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time, and a directly contradictory statement at another. *R.* v. *Zumeerun* (2): *R.* v. *Palany Chetty* (3): and *R.* v. *Mahomed Hoomayoon Shaw* (4) followed: *Empress* v. *Niaz Ali* (5) overruled.

Per DUTHOIT J.—Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconciliable before a conviction can be had upon the ground that one of them is necessarily false.

The English cases upon this subject are irrelevant to the interpretation of the law of India, since the Indian Legislature has not followed the law of England

(1) I. L. R., 6 All. 438.
(2) 6 W. R. Cr. 65.
(3) 4 Mad. H C. Rep. 51.
(4) 13 B. L. R. 324.
(5) I. L. R., 5 All 17.

in regard to perjury. *Trimble* v. *Hill* (1) and *Kathama Natchiar* v. *Dorasinga Tever* (2) referred to.

IN this case the Sessions Judge of Azamgarh forwarded, for the orders of the High Court, under s. 339 of the Criminal Procedure Code, an application from the Magistrate of Azamgarh, for sanction to prosecute two persons, Ghulet and Sahai, for the offence of giving false evidence. The Magistrate's application stated the following facts:—

"Both men were admitted as approvers in the lower Court, and there gave a detailed account of a dacoity in which they confessed to have been engaged. When, however, they appeared as witnesses in the Sessions Court, they denied all knowledge of the facts previously stated. They have therefore committed perjury either by the former or by the latter statement, and are thus liable to prosecution under the section above quoted (s. 193 of the Penal Code)."

The facts of the case are further set forth in detail in the judgment of DUTHOIT, J.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

The accused were not represented.

The Court (STRAIGHT, Offg. C.J., and DUTHOIT, J.) delivered the following judgments:—

DUTHOIT, J.—This is a case submitted under the provisions of the final clause of s. 339 of the Code of Criminal Procedure, which came before me in single Bench. Being of opinion that sanction to prosecute for the offence of giving false evidence should not be granted unless there be good *primâ facie* ground for considering that a conviction will follow, and that, in this case, unless the charge be drawn in the alternative form provided as No. XXVIII (4) in sch. V, Act X of 1882, such result is improbable, I had to consider the law regarding an alternative charge of offences made punishable by s. 193 of the Indian Penal Code, as laid down for these Provinces in *Empress* v. *Niaz Ali* (3), at p. 22. The passage to which I refer is the following:—"It is not of itself sufficient to warrant a conviction, either for giving false evidence or making a false oath, that an accused person has made one statement on oath

(1) L. R., 5 Ap. Cas. 342. (2) L. R., 2 Ind. Ap. 159.
(3) I. L. R., 5 All. 17.

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at one time, and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence, independent of the other contradictory statement, to establish the falsity of that which is impeached as untrue. The remarks of Holroyd, J., in *R.* v. *Jackson* (1) are valuable upon this point:— 'Although you may believe that on one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury, for there are cases in which a person might very honestly and conscientiously believe and swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time. Again, if a person swears one thing at one time and another at another you cannot convict where it is not possible to tell which is the true and which is the false'. Gurney, B., also took a similar view in the case of *R* v. *Wheatland* (2) upon which and a decision of the Court of King's Bench in *R.* v *Harris* (3) Mr. Greaves in *Russell on Crimes* (Vol. III, pp. 82 and 23, *notes*) records some valuable comments. S. 455 of the Criminal Procedure Code is no authority for the form of charge prepared by the Magistrate in the present case, and the word 'alternative' as used in the section means that where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated as will guard against his escaping conviction through technical difficulties."

Being myself of opinion that, under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless, indeed, some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time, and a directly contradictory statement at another, I directed the case to be laid before a Division Bench.

This has been done, and I have now to set out the grounds of my opinion as stated above. For reasons which shall be detailed

(1) 1 Lewin C. C. 270. (2) 8 C. and P. 238.
(3) 5 Barn. and Ald. 926.

hereafter, I think that English cases are irrelevant to the matter under discussion; but as they have been cited, and are relied on by my learned colleague, I will briefly consider them.

The question immediately before us appears to have been first raised about a century after perjury in a witness became an offence punishable by the common law. The point is thus stated by Chambre, J. (I quote from the foot-note in *R.* v. *Harris*, at p. 938 of 5 Barn. and Ald.): —"It has been doubted whether, if the same person swears contrary ways at different times, he can legally be convicted of perjury without some further proof to falsify that testimony on which the indictment assigns the perjury. For it is said that on whichsoever of his contradictory oaths the perjury be assigned, that oath must be taken to be true unless disproved by two other witnesses. On the other hand, some have thought that if the indictment states the two contradictory oaths, and then concludes, that 'so the defendant committed wilful and corrupt perjury', without any averment to falsify the facts sworn on either of the oaths, it is sufficient to warrant a conviction. Perhaps an indictment in that form might be sufficient; but even upon the common indictment assigning the perjury upon one of the oaths only, and averring the falsity of the facts there sworn (in the usual form), it seems that the defendant may justly be convicted without any other proof of the perjury than producing and proving the other deposition which the defendant had made in contradiction to that on which the perjury is assigned; for its being the defendant's own deposition, he cannot be admitted to say that deposition was false, for *nemo allegans turpitudinem suam est audiendus*, and, if that be true, the other on which the perjury is assigned must of course be false. The reason why, in other cases, the perjury must be proved by witnesses that outweigh the testimony of the defendant is because, where there is only oath against oath it stands in suspense on which side the truth lies. But when the same person has, by opposite oaths asserted and denied the same fact, the one seems sufficient to disprove the other, and, with respect to the defendant (who cannot contradict what he himself has sworn), is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichsoever of them is given in evidence to disprove the other, it can hardly lie in the defendant's mouth to deny the truth of that evidence, as it came

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from himself. Upon this principle, Yates, J., convicted a man at Lancaster Summer Assizes, 1764. He had first made his information on oath before a justice of the peace, that three women were concerned at a riot at his mill (which was dismantled by a mob, on account of the price of corn), and afterwards at the Sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favour) he then swore that they were not in the riot. There was no evidence on the trial of the defendant for this perjury to prove that the women were in the riot (which was the perjury assigned); but the defendant's own original information on oath being produced and read, whereby he had sworn they were in the riot, the Judge thought it sufficient to convict him. He was accordingly found guilty, and transported. And afterwards Lord Mansfield, C. J., and Wilmot and Aston, JJ., to whom Yates, J., stated the reasons of his judgment, concurred in his opinion."

So the law stood till the Westminster sittings after Michaelmas term 1821, when two precisely similar cases, growing out of the same transaction, and in which the indictments were drawn in the same form—*R.* v. *Knill* (1) and *R.* v. *Harris* (2)—were tried on the same day. In *R.* v. *Knill* (1) no evidence was given, except simply the proof of the contradictory oaths of the defendant on the two occasions, and the jury convicted the defendant on those counts of the information which charged the perjury specifically to have been on one of the two occasions. A rule to show cause why there should not be a new trial was asked upon the ground, among others, that mere proof of a contradictory statement by the defendant on another occasion was not sufficient without other circumstances showing a corrupt motive, and negativing the probability of any mistake. But the Court held that the evidence was sufficient, *the contradiction being by the party himself*, and that the jury might infer the motive from the circumstances; and they refused a rule *nisi* for a new trial. In *R.* v. *Harris* (2) the jury acquitted the defendant upon the counts of the information which charged the perjury as specifically committed on one of the two occasions, but convicted him on those counts which we should call alternative charges; and the Court

(1) 5 Barn. and Ald. 929. (2) 5 Barn. and Ald., 926.

granted a rule *nisi* for arresting the judgment, on the ground that those counts were insufficient. The judgment of the Court of King's Bench was delivered by Abbott, C. J., who, after stating that the procedure by alternative charges was new, which the footnote to the case shows that it was not, went on to say :—" The next and most material objection is the injury to which a defendant may be exposed For we think it impossible to say, consistently with any known rule of law, that a person, acquitted or convicted on an indictment in this form, could plead such acquittal or conviction as a bar to an indictment charging perjury in the usual way on either of the depositions. The answer to such a plea would be :—' You have never been tried on the charge now preferred against you,' and such an answer would undoubtedly be true in fact, and we think good in law. So that a defendant might be twice put in peril of the punishment of perjury, and perhaps twice convicted and punished on the same subject-matter, if an indictment like the present could be sustained. It is not necessary to say whether an indictment charging contradictory depositions, together with other charges and averments not found in the present information, would be good as an indictment for a misdemeanor. The difficulty of showing on which of two occasions a party swore falsely, may perhaps enable a person to escape punishment, whose conduct, like that of the present defendant, may plainly appear to be in the highest degree reprehensible. But we think it better that such a person should escape than that an indictment should be held good, which is liable to the material objection of putting a person twice in peril of the pains of perjury on the same subject-matter, and we know of no election to adopt this or that mode that can be binding on the Crown, as was suggested in the argument at the bar in support of this information."

As *R.* v. *Harris* (1) is still the leading English case on the subject, I may be allowed to remark regarding it, that its *ratio decidendi* is inapplicable in this country, for—

(1) The procedure by alternative charges is, as I shall show in detail hereafter, not new in India, and is expressly sanctioned by the law.

(1) 5 Barn. and Ald. 926.

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(2) With reference to the terms of s. 403 of the Code of Criminal Procedure, and to the form of alternative charge prescribed by the Code, "the alternative conviction becomes," to use the words of the learned Judges in *Palany Chetty's case* (1), "a legal bar to any other criminal proceeding against the same person on either of the charges to which the conviction relates."

(3) The distinction between *felonies* and *misdemeanors* does not exist in India.

R. v. *Harris* (2) has been followed in *Mary Jackson's case* (3), in *R.* v. *Wheatland* (4), in *R.* v. *Hook* (5), and in other cases. As regards all these cases, I would remark generally that the law of England as to the necessity of calling at least two witnesses to support an assignment of perjury, and of showing that the oath taken was material to the question depending, is not law in India. As regards the remark of Holroyd, J., in *Mary Jackson's case* (3), as to the possibility of conflicting statements being made without criminal intention, I would say that it is beside the point now at issue; for unless the two contradictory statements are so absolutely opposed as to exclude the possibility of any hypothesis than that of the prisoner's guilt, there can be no conviction upon an alternative charge (I. L. R. 10 Calc. 405). And as regards *R.* v. *Hook* (5) I would note that although *R.* v. *Harris* (1) and *R.* v. *Wheatland* (4) were followed in it, yet *R.* v *Knill* (6) was referred to with modified approval by two of the five Judges (Pollock, C.B., and Byles, J.); and Pollock, C.B., remarked that though *R.* v. *Knill* (6) is "not now quite safe to be acted on," yet "it is supported by the judgment of the Court of Queen's Bench in Lord Tenterden's time and in that of Lord Mansfield."

But we have, as it seems to me, nothing to do with English cases in the matter before us. Their Lordships of the Privy Council have in *Trimble* v. *Hill* (7) and in *Kathama Natchiar* v. *Dorasinga Tever* (8) laid down the principle that where a Colonial Legislature has passed an Act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by a Court of Appeal

(1) 4 Mad. H. C. Rep., 51.
(2) 5 Barn. and Ald 926.
(3) 1 Lewin C. C 270
(4) 8 C. and P. 238.
(5) D. and R. 606.
(6) 5 Barn. and Ald. 929.
(7) L. R., 5 Ap. Cas. 342.
(8) L. R, 2 Ind. Ap. 169.

in England, such construction should be adopted by the Courts of the Colony. But when the Indian Legislature has deliberately rejected, or intentionally declined to follow, the law of England upon a particular point, the case is altogether different. And as regards the offence of "giving false evidence," the framers of the Indian Penal Code, for reasons stated in Note G. to their Report dated the 14th October, 1837, (Parl. Papers, 3rd August, 1838, Indian Law Commission, 673), thought proper to discard the English law of "perjury," and to draft the provisions of the Indian Penal Code in this respect upon the lines of the French *Code Pénal* regarding "*faux temoignage.*" The Indian Law Commissioners were afterwards pressed to at least allow the word "perjury" to be retained in their Code, as being one familiar to the people of India and long in use; but they refused to give way (para. 130 of their Report dated the 24th June, 1847, Parl. Papers, 16th May, 1848, Indian Law Commission, 330) on the ground that "the authors of the Code thought it inexpedient to use the technical terms of the English law where they did not adopt its definitions, and so materially departed from it in substance."

Before the enactment of the Indian Penal Code, the penal law of Bengal and Madras was the Muhammadan Law, unless varied by Regulations. In the Bombay Presidency, the penal law was entirely contained in the Regulations. I have been unable to find anything in the Bombay Regulations bearing upon the point at issue. In the Madras Presidency a Regulation (III of 1826) was passed on the 17th October, 1826 (probably upon the doctrine of *R.* v. *Harris* (1) becoming generally known), cl. (i), s. 1 of which provided as follows:—"If a party or witness shall wilfully and deliberately give two contradictory depositions on oath, or under a solemn declaration taken instead of an oath, on a matter or matters of fact material to the issue of a judicial proceeding, such party or witness shall be liable to be committed for trial before the Court of Circuit for wilful and corrupt perjury; provided that the contradiction between the two depositions be direct and positive, and that, upon the whole circumstances of the case, there be strong grounds to presume the corrupt intention of the party or witness."

(1) 5 Barn. and Ald. 926

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In Bengal and the N.-W. P. the law was not finally settled till 1831, when the *Kazi-ul-Kazaat* and the *Muftis* of the Calcutta Sudder Court were called upon (Constructions S. D. A. and N. A., ed. 1839, vol. ii, p. 19, to state the Muhammadan law as to the proof required on charges of perjury. On the 2nd September, 1831, these gentlemen delivered an elaborate opinion, the material portion of which, so far as our present purpose is concerned, ran thus :—" Where there exists a contradiction in the evidence of a witness before one or more Courts, and the difference be such that the two statements can in no way be reconciled with each other; for instance, if a witness depose that he saw *A* kill *B*, mentioning the time and place in which the murder was committed, and afterwards, in the same Court or some other, shall state that he did not witness the transaction, this is a direct retraction of this former evidence, and he cannot make the plea of forgetfulness : on the contrary, he must acknowledge what he first stated to have been erroneous, and if this retraction be made under a proper sense of repentance and contrition, he is not liable to *tazeer;* but if with contempt and boldness he is liable to *tazeer;* and the Hakim is left to decide upon his own discretion what were the man's motives."

This settled the law upon the point in these Provinces for the next thirty years, and in 1847 (Carrun's Circular Orders of the Court of Nizamat Adawlut, ed. 1855, p. 422) a form "to be used in cases of statements directly at variance with each other" was promulgated in the following terms :—" Perjury, in having, on the 1st January, 1847, intentionally and deliberately deposed, under a solemn declaration, taken instead of an oath, before the of , that (here enter the first statement), and in having on the 13th February, 1847, again intentionally and deliberately deposed, under a solemn declaration, taken instead of an oath, before the said (or any other Court), that (here enter the second statement), such statements being contradictory of each other, on a point material to the issue of the case."

The question of proof of the offence of giving false evidence by contradictory statements was considered by the Indian Law

Commissioners in 1847, and was noticed by them in para. 154 of their second and concluding Report on the Indian Penal Code (Parl. Papers, 16th May, 1848, Indian Law Commission, 330) in these terms:—" By Regulation III of 1826 of the Madras Code, a person wilfully and deliberately giving two contradictory depositions on oath is liable to be convicted of perjury, and to suffer the punishment prescribed for that offence. It has been decided (*Russell*, vol. ii., p. 542) that, under the law of England, perjury cannot be legally charged and assigned by showing that the defendant did on two different occasions make certain depositions contradictory to each other, with an averment that each of them was made knowingly and deliberately, but without averring or showing in which of the two depositions the falsehood consisted; and we apprehend that under similar circumstances the offence of giving false evidence could not be so charged under clause 188. We are strongly of opinion that 'whoever in any stage of a judicial proceeding, being bound by an oath, or by a sanction tantamount to an oath, to state the truth, gives a statement touching any point material to the result of such proceeding which directly and positively contradicts a statement touching the same point, given by him on oath, or under a sanction tantamount to an oath, in any stage of a judicial proceeding, at another time,' should (failing any satisfactory explanation of the contradiction to negative the inference of a corrupt intention) be liable to punishment. Under such circumstances, it is morally certain that the party has given a false statement on one or other of the two occasions, though it may be impossible to show positively which of the contradictory statements is false. Both statements may perhaps be false, but one only can be true. It is possible, indeed, that the first statement may have been false through an error or mistake, which has been corrected by subsequent information, and that the second contradicts the first because it contains the truth which had come to the knowledge of the party in the meantime. But when there is no such allegation, nor any explanation of the contradiction to negative the inference that the party at one time or the other has been guilty of stating on oath (or as it may be) as true what he knew to be false in order to deceive a Court of Justice, on a point material to the question to

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be decided by the Court, we think the law should be so framed that he should not be able to escape from the punishment he would well deserve. In the case in question we do not see why the party who has given contradictory statements might not be charged with the offence of false evidence upon each of them successively—first, upon that which from the circumstances there is reason to think is most probably the false one, giving the other in evidence against him, which would throw upon him the *onus* of proving it to be false, and if he succeeded in defending himself against that charge by means of such proof, then upon that other statement as proved to be false by the evidence he had himself adduced. By this mode of proceeding a really guilty person could hardly escape. And a person who had such a defence as before supposed, being able to show, for instance, that his second statement differed from the first because he had ascertained in the meantime that the first statement was incorrect, would have an opportunity of clearing himself by given proof to that effect. If necessary, a special rule might be enacted to sanction this mode of procedure."

The preparation of the Code of Criminal Procedure went on (under the same hands) *pari passu* with that of the Penal Code, and although the former Code was not passed till nearly a year after the latter, the two Codes came into force on the same day, the 1st January, 1862. The Code of Criminal Procedure contained in its 242nd section a provision which satisfied the requirements of the Indian Law Commissioners as cited above. The provision was in these terms :—" When it appears to the Magistrate that the facts which can be established in evidence show the commission of one of two or more offences falling within the same section of the Indian Penal Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads charging respectively each of such offences accordingly" And effect was further given to the terms of s. 242 by the terms of ss. 381 and 382 of the Code. What happened in Bombay in the matter now before us I have been unable to discover ; but the Madras Court of Sudder Nizamat, in April 1862, (the Madras Regulation III of 1826 having been repealed as from the 1st January, 1862, by Act XVII of 1862), the Calcutta Court in May

1862, and the Agra Court in June 1862, failing apparently to notice the effect of ss. 242, 381, and 382 of the Code of Criminal Procedure, issued Circular Orders, informing the Courts subordinate to them that the mere making of contradictory statements upon oath would not now constitute the offence of "giving false evidence," or, as the Calcutta Court still called it, "perjury." The Calcutta Sudder Court was merged in the High Court in 1862, and cases soon afterwards began to be decided contrary to the terms of the Circular Order of May, 1862. At length, in 1866, a case in point, *R.* v. *Zumeerun* (1), came before a Bench of two Judges (Norman and Campbell, JJ.), which was inclined to support the view of the law taken in the Circular Order, and was by them referred to a Full Bench for an authoritative ruling; and the Full Bench (Norman and Campbell, JJ., doubting) held that where a witness intentionally makes two contradictory statements upon oath, and it is doubtful which of the two statements is false, he may be convicted of the offence of giving false evidence upon an alternative finding. Peacock, C. J., remarked :—"I have no doubt that there may be an alternative finding as well in a case in which the evidence proves the commission of one of two offences falling within the same section of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two sections of the Penal Code, and it is doubtful which of such sections is applicable.

"This appears to me to be quite clear when s. 381 of the Code of Criminal Procedure is read together with s. 242 and clause (5), s. 382 of that Code.

"*A* swears before a Magistrate that he saw the prisoner kill *B*. The prisoner is committed to the Sessions for trial for murder. *A* on the trial swears that he did not see the prisoner kill *B*, and the prisoner is acquitted. *A* is, in consequence, committed for trial for giving false evidence, and two charges are framed against him under s. 242, Code of Criminal Procedure :—

"1*st*.—That he intentionally gave false evidence before the Magistrate by swearing that he saw the prisoner kill *B*.

(1) 6 W. R. Cr. 65.

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"2nd.—That he intentionally gave false evidence before the Sessions Judge by swearing that he did not see the prisoner kill *B*.

"The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate, or that made before the Sessions Judge, was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has, in consequence, been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness, in consequence of bribery or other cause, has sworn falsely before the Sessions Judge, the administration of justice has been defeated, and a murderer has been acquitted. It is clear that, unless the law is very defective, or we are to trifle with the administration of justice, *A* ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit.

"In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads, under s. 242.

"The Sessions Judge would also be strictly within the letter as well as the spirit of ss. 381 and 382 (clause 5) in finding that *A* is guilty of the offence of intentionally giving false evidence, and that he is guilty either of the offence specified in the first head or of the offence specified in the second head of the charge, and is convicted of an offence punishable under s. 193 of the Penal Code. The words in clause (5), s. 382, which follow the word 'namely,' are clearly given only as an example, and it is clear that without an example of a case falling within the latter branch of s. 242, such a case falls within the strict letter of clause (5), s. 382".

And Seton-Karr, J., said:—"I entirely concur with the learned Chief Justice. Indeed, I had always understood that our Court and the subordinate Courts acted on the principle laid down in the judgment with which I concur; and until this reference was made, I was not aware that there existed any very serious doubts on the point. Indeed, unless Courts did and could return an alternative

finding in such cases of false evidence, the most disastrous consequences to the administration of justice would ensue. Violent crime and crime of all kinds would go unpunished, and the witnesses who had been bought off to deny their statements implicating the perpetrators of such violent or other crimes, would go unpunished also. I can conceive nothing more detrimental to society."

The same point was raised in the Madras High Court in May, 1868; and that Court (Scotland, C. J., and Collett, J.) came to the same conclusion. The head-note of the case, *R.* v. *Palany Chetty* (1), runs thus:—"Proof of contradictory statements on oath, or solemn affirmation, without evidence as to which of them is false, is sufficient to justify a conviction, upon an alternative finding, of the offence of giving false evidence, under s. 72 of the Indian Penal Code, and ss. 242, 381, and 382 of the Criminal Procedure Code."

Proposals for the amendment of the Code of Criminal Procedure were shortly afterwards under discussion by the Legislature, and it is to be presumed that the circumstances which have been set out above were before the Council, and were considered by it. Act X of 1872 was passed in April, 1872. In that Act, the provisions of s. 242 and the alternative form of finding given in s. 382 of the old Code were not re-enacted; but in place of them was enacted a section (455), which provided that—"If a single act, or a set of acts, is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences,"—and a section (442) which provided that the charge might be in the form given in the third schedule to the Act, or to the like effect. That schedule contained a form for alternative charges on s. 193, which runs thus:—"That you, on or about the day of , at , in the course of the inquiry into , before , stated in evidence, that'
and that you, on or about the day of

(1) 4 Mad. H. C. Rep., 51.

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at , in the course of the trial of ,
before , stated in evidence that '
', one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, &c."

In his note to s. 461 of Act X of 1872, which took the place of s. 381 of Act XXV of 1861, Mr. Prinsep wrote (ed. 1873, p. 311) as follows :—"This section does not provide for an alternative finding in a case in which it is doubtful of which of two offences under the same part of the same section the accused person is guilty ; for instance, a case in which a person is charged with having intentionally given false evidence in making one statement, and again with the same offence in making a diametrically opposite statement. It has been usual to enter each of these offences in a separate head of the charge, and for some attempt to be made by the prosecution to prove one or other of these offences, and for the Court of Session, if not satisfied with the evidence as to the truth or falseness of either statement, but still being satisfied from the contradiction that the accused is guilty of having intentionally given false evidence, to convict in the alternative form of finding. But though s. 461 does not expressly provide for this procedure, it will be seen from a reference to the last form of charge given in schedule iii. that it is contemplated that such charges should be made in one charge, and not in two separate heads as heretofore. Probably, therefore, if any evidence is offered, or is likely to be offered in proof of the falseness or truth of one of such contradictory statements, a separate head of the charge will be made so as to provide for such offence, and the alternative form of charge will also be given."

The changes made by the new Code led to its being doubted in Bengal whether *R.* v. *Zumeerun* (1) would stand, and the whole matter was therefore again fully considered by the Calcutta Court in April, 1874. It was then held—*R.* v. *Mahomed Hoomayoon Shaw* (2)—by a majority of the Court (Couch, C. J., Kemp, Markby, Glover, Ainslie, Pontifex, Birch, and Morris, JJ., (Jackson and Phear, JJ., dissenting) that a conviction of giving

(1) 6 W. R. Cr. 65. (2) 13 B. L. R. 324.

false evidence upon an alternative charge is good, although it be not found which of the two statements charged is false; and Couch, C. J., remarked:—"It is material to notice that the charge does not allege that the statement made on the 23rd of January, 1873, was known or believed to be false, or not believed to be true. Nor does it allege that the statement made on the 13th of February, 1873, was known or believed to be false, or not believed to be true. It merely alleges that one of the two statements set out in it was known or believed to be false by the accused, or not believed by him to be true.

"Upon this charge he was tried, and in the summing up of the Judge, the jury were told, and very properly:—'Before you can find him guilty, you must be satisfied that he made one or other of the statements contained in the charge, knowing that such statement was false, and deliberately intending to make a false statement.' The majority of the jury found that the accused was guilty of the offence specified in the first and second heads of the charge, the offence specified being an offence punishable under s. 193 of the Penal Code After such a summing up, calling the attention of the jury so plainly to the necessity of their being satisfied that one or other of the statements was known to be false, and that the accused deliberately intended to make a false statement, I think there can be no doubt that the offence of giving false evidence within the meaning of s. 191 of the Penal Code was committed on one or other of the occasions specified in the charge. Then it appears to me that the only question is, was it necessary, in order to make the conviction legal, that the jury should find on which of the two occasions the offence was committed? Does the law in this country render that essential to a conviction for giving false evidence?

"The 439th section of the Code of Criminal Procedure now in force requires that 'the charge shall state the offence with which the accused person is charged'; and the 440th, that 'the charge shall contain such particulars as to the time and place of the alleged offence, and the person against whom it was committed, as are reasonably sufficient to give notice to the accused person of the matter with which he is charged.' The charge in this case does that. It states what the offence is, namely, that the accused

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committed an offence punishable under s. 193 of the Penal Code, and it contains such particulars as to the time and place as give sufficient notice to the accused of what he is charged with. He is told that by making the two statements, one of which it is alleged he knew or believed to be false, or did not believe to be true, he committed an offence punishable under s. 193.

"S. 442 says that the charge may be in the form given in the 3rd schedule to the Act. In that schedule there is such a form of charge as was made against the accused in this case, and it appears to me that unless a conviction upon a charge so framed is allowed by law to be valid, the putting this form of charge in the schedule was not only useless, but is also inconsistent with saying that the jury is required by the law to find and to state upon which of the two occasions mentioned in the charge the false evidence was given. If the jury is required to state that, then two charges in the form No. 10 in the schedule would be proper. One would state that evidence was given on the 23rd of January, 1873, which the accused either knew or believed to be false, and the other would state that evidence was given on the 13th of February, 1873, which the accused either knew or believed to be false. If it is required by the law that the jury or the Court, where the trial is with assessors, should find distinctly on which of the occasions the false statement was made, the alternative charge given in the schedule is perfectly useless.

"Again if it is necessary for the jury, in order that the conviction shall be valid, to say which of the two statements is the false one, it is requiring the jury to find what is not alleged in the charge. All that the charge alleges is, that one of the statements was known or believed to be false, or not believed to be true, and that thereby the offence was committed. Such a charge being authorized by the law, it appears to me that all which the Court has to find to sustain a conviction for giving false evidence is that the allegations in it are proved.

"In considering what the intention of the Legislature was in making these provisions in the new Code of Criminal Procedure, and giving in the schedule this form of charge, I think it is important to see what, at the time this Act was passed, was the acknowledged state of the law. It had been decided by a Full Bench of

this Court that a conviction upon a charge of this description was legal. That view of the law had been acted upon, undoubtedly, for some years in this Presidency. In Madras, as appears from the case of *R.* v. *Palany Chetty* (1), the same view of the law was adopted, and it cannot be doubted that this decision was acted upon in that Presidency. We have no reported case in the Bombay High Court, and I do not desire to speak merely from memory as to what was the practice in that Presidency. But in Madras and in Calcutta, and, my belief is, in Bombay also, the law was considered at the time this Act was passed to be, that a conviction of a person who was found to have intentionally made contradictory statements on oath or solemn affirmation was legal. I cannot think that the Legislature intended, by the way in which the new Code has been drawn, by the omission of certain sections which are in the old Code and the substitution of others, which probably were supposed to be an improvement in the wording or arrangement of it, to alter the law as to the offence of giving false evidence. That this charge, although called an alternative charge, and being so far alternative that two statements are set out in it when one offence only is alleged, namely, that the accused thereby, that is by making statements, one of which he knew or believed to be false, committed the offence, should be considered as a charge of but one offence, and was to be dealt with by the jury as such, I think is shown by s. 452, which says that there shall be a separate charge for every offence.

"It was argued that it would prejudice the accused in respect of his subsequently pleading an acquittal or a conviction, if a conviction were allowed upon a charge framed as this is, and that he might be tried again for making one or other of the statements which are the subject of the present charge. S. 460 provides for a person who has once been tried for an offence, and convicted or acquitted of such offence, not being liable to be tried again on the same facts for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under s. 455. If the question should ever come before me—What is the effect of a conviction or an

(1) 4 Mad. H. C. Rep. 51.

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acquittal upon such a charge as this, I should hold that the accused could not be tried again for giving the evidence on either occasion which is set out in the charge, for then he would be tried again on at least a part of the same facts as he had been tried upon before.

"I concur with my learned colleagues in thinking that the second part of s. 461 does not apply to this case. This is a charge of but one offence, and the conviction is a conviction of that offence, and need not specify more than the offence of which the person accused is convicted. Here the jury found upon the facts proved before them that the accused committed an offence punishable under s. 193. It appears to me that this finding is a good finding; nor do I see that s. 257 as to the duties of the jury interferes with it, or prevents the finding being as it is. S. 257 says 'that it is the duty of the jury to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned.' I understand this to mean that it is the duty of the jury to find whether the view of the facts that the accused made the two statements, that they were such that they could not both be true, and that he knew or believed one of them to be false, is true. I do not understand it as meaning that the jury have to select from a part of the charge some of the facts, and say whether they are true. What is meant is the whole view of the facts alleged against the accused, the view taken by the prosecution which leads to the conclusion of his guilt, or the view which is set up on his behalf, and which would make him innocent. I do not feel at all pressed by the provisions of s. 257. It appears to me that this was a charge authorized by the law, and that the allegations in it, which are sufficient to support a conviction, have been found by the jury to be proved. If it is a good charge, nothing more is necessary to be found by the jury than that the allegations contained in it are true. I cannot say that it is an illegal charge, finding it, as I do, deliberately allowed by the Legislature, and inserted in the schedule which is referred to in s. 442."

As regards the point at issue, there is no material difference between the present Code of Criminal Procedure (Act X of 1882) and the superseded Code (Act X of 1872). Ss. 439 and 440 of

Act X of 1872 have become ss. 221 and 222 of Act X of 1882. S. 554 of Act X of 1882, as compared with s. 442 of Act X of 1872, stands thus:—

Section 442, *Act X of* 1872.	*Section* 554, *Act X of* 1882.
The charge may be in the form given in the 3rd schedule of the Act, or to the like effect.	The forms set forth in the 5th schedule, with such variation as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

The form of charge (No. XXVIII (4) of schedule V, Act X of 1882) corresponds with the form given in the 3rd schedule of Act X of 1872.

The sum of the matter I take to be this:—Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false. But when this is found, and if the person making the two absolutely contradictory statements is of sound mind, it seems to me plain that one of the two statements must be false, and that the person making them cannot believe both of them to be true, but must know one of them to be false; and if when making them he was legally bound by an oath, or by any express provision of law, to state the truth, he must, as it seems to me, be guilty, as regards one or the other of the two statements, of the crime of "giving false evidence." And looking to the course which the law upon the subject has taken in India during the past sixty years, and to the evident intention of the Legislature, I cannot doubt that the Code of Criminal Procedure has dispensed with the necessity of finding which of the two statements is false, and has empowered the Courts to convict alternatively.

In the case now before us, Ghulet before Munshi Behari Lal, a Magistrate of the first class in the Azamgarh District, on the 13th December, 1883, deposed as follows:—

"When the *panchayat* was removed from the road to the *kothara*, five carts were standing near the large well and the *nim* tree. The cartmen were cooking their food. They were naked. They had nothing but *dhotis* on. I could not see their purses, as they had their *dhotis* tied high. When the *panchayat* broke up, all of us came and

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stood on the road. Harpal, chaukidar, the accused, here present, asked the *panches* to listen to him. He then proposed that we should take our food, and then assemble in the '*shisham*' grove, and rob the cartmen of their money. Sacha and I went home to the *chauki* to take our food. Tehal went to Bipat, his '*samdhi's*' house. The rest went northwards to Sarai Mohan with Harpal, where Sheopal and Harpal live. At seven *gharis* after nightfall, Sacha and I, after taking our dinner, went to the *shisham* grove. When I got there, I found Harpal, Bikanu, Sheopal, Dhuman, Sheo Tehal, Paltu and Bipat in the grove. We left that place and came and stood near the road at a distance of 6 or 7 biswas to the west of the village of Bhira. Harpal then told us to wait while he went to see whether the carts had gone on or not. He went and brought Gulzar and Sahai, and said that the carts had gone on. We all went after the carts; Harpal would not let us have anything to do with the carts while they were within his chaukidari circle, as he said he would be called to account for it. After this, we beat the cartmen with clubs near Barda. We all of us beat them I did not strike any one. The cartmen were knocked down. I saw two cartmen knocked down.....Harpal, Bikanu and Gulzar took the cartmen's money.....It was 5 or 6 *gharis* before dawn when the attack was made, and the money taken. The police station is less than a mile from the spot where the occurrence took place. The cartmen went there, but no one came. After robbing the money, we all left the main road and went by the road on the east to Banjari Pokhri in the village of Bhira. There we shared the money. Harpal, accused, gave me Rs. 5, Sacha 5, and Sahai 6; and Harpal, Bikanu and Sheopal took Rs. 20 each .....Sacha and I took the money and went away. I left the other persons on the spot. The time was 3 *gharis* or a *pahar* before dawn. Thana Barda is a *kos* from Banjari Pokhri. The place where the cartmen were beaten is less than a mile north of the *shisham* grove. The grove is three *rassis* from the road. The money was taken out of three purses, of which Harpal had two, and Bikanu one, and the division was made at Banjari Pokhri. The persons named took away the purses with them. These men (pointing to the accused) were the dacoits. I was standing at a distance of seven or eight paces from the carts on the north side. All the carts were in front of

me. The accused took the money from the two last carts. My house is a *kos* from Bhira. To the west of Bhira and to the right of the road to the *chauki* is a tank. I stayed at my house one *ghari*. The night was dark. I can see 50 paces on a dark night. Banjari Pokhri is less than a mile on the north of Bhira..... Gulzar and Tehal struck at the cartmen with their *lathis*. They struck the cart drivers in the front carts, and did not molest the behind ones. I purchased grain, and spent the Rs. 5 which I had received. I purchased it from several shops." And in a deposition made in the Sessions Court at Azamgarh on the 20th March, 1884, Ghulet said:—"I was not concerned in the dacoity which took place near Barda. I know nothing about that dacoity. I know nothing about the matter charged against the accused now in Court."

Sahai, before the said Magistrate, on the 13th December, 1883, deposed as follows:—

"In the evening at sunset, the *panchayat* rose, and proceeded to *kothara* Padarath Singh. On the road we saw five carts standing..... ..... After coming to the road, Chirkut, Jaipal, Dhuman Siddhu, and Sur went away home; all the others remained. Harpal, chaukidar, accused now present, told all of us that the cartmen had money and that we might rob them of it if we met in the *shisham* grove after taking our food. Mazhar and Gulzar went home, and so did Sacha and Ghulet. Bipat went with Tehal to his house; the others went north in the direction of Sarai Mohan, where Harpal lives. Dhuman, Paltu, Sheo Tehal and Harpal went away. Then at midnight Harpal came to the place, and first took Gulzar and Mazhar to the road towards west from Bhira. Tehal, Bipat, Ghulet, Sacha, Dhuman, Paltu, Sheo Tehal, Bikanu and Sheopal were standing there. Harpal and Bikanu said that the carts were moving on, and we had all better start. On the way, at the Siwana chauki, it was suggested that the robbery should take place there. Gulzar said that they would get into trouble, and that there must be no plundering at that place. We went on to the confines of Barda, and then the robbery began. We all used our sticks at once. All of us were armed with sticks. The cartmen were beaten. Ghulet did not strike any one. I also

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beat a cartman with my stick. Bikanu, Harpal, Gulzar, and Sheopal robbed the cartmen of their money. Having plundered the money, they ran to the east, and passing by the outskirts of Bhira, they went to Banjari Pokhri. There the money was divided. Harpal and Bikanu divided the money. I received Rs. 6, which were given me by Bikanu. One rupee was taken back again. Rs. 5 were given to Ghulet, and Rs. 5 to Sachu. All the other persons got Rs. 6 each. Harpal, Bikanu, Sheopal, and Gulzar said that they would take Rs. 20 each. I asked them why they had given me less. They said that we were labourers, while they were road chaukidars and would be held to be responsible for what had happened. Then I went home alone. The whole money was in three network purses, two of which were in the hands of Bikanu and one was with Harpal.....The scene of the occurrence must be one *kos* from the *shisham* grove, or a little more. I left first .....When I left, it must have been about a *pahar* before day-break. When the attack took place, it must have been about 6 *gharis* before day-break. The sheet now shown me belongs to me. It is stained with the oil of my head, and it was stained somewhat with the oil of the carts at the time of the attack. The red stains on the sheet were caused by blood at the time of assault. Banjari Pokhri must be one *kos* to the north of the place where the attack took place and less than a mile from mauza Bhira. I took my money from Banjari Pokhri and went away first. At the time of the attack, Ghulet was ten paces behind all the carts." And in a deposition made in the Court of Session on the 20th March, 1884, Sahai said:—I know nothing of the Barda dacoity. I know nothing about the matter charged against the accused in Court."

Primâ facie these statements are absolutely irreconcilable. I would therefore sanction the prosecution of Ghulet and Sahai on alternative charges for the offence of giving false evidence on the occasions and in the statements set out above.

STRAIGHT, Offg. C. J.—The elaborate and exhaustive order of my brother Duthoit satisfies me that my judgment in *Empress* v. *Niaz Ali* (1) was erroneous. In expressing the views I gave utterance to therein, I enunciated what I believed to be and still believe

(1) I. L. R. 5 All. 17.

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to be the rule of English law upon the subject. Unfortunately, my attention was not called either to the rulings of the Courts of India, to which my brother Duthoit has referred at length, nor was it directed to the form in the schedule of the Criminal Procedure Code which expressly provides for the forming of alternative charges of giving false evidence. It goes without saying, that had I been aware of the two Full Bench decisions of the Calcutta Court, I should have hesitated before differing with such high authorities, and should have felt bound, had I differed, to enter fully and explicitly into my reasons for doing so. No useful purpose would be served by my now discussing the rulings of the English Courts which were present to my mind at the time I gave judgment in the case of *Niaz Ali* (1). As I agree with my brother Duthoit, that they are inapplicable in this country, it is enough for me to say that I concur in the order he proposes.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

1884. *August 7.*

QUEEN-EMPRESS *v.* KANDHAIA AND OTHERS.

Arrest of person required to give security for good behaviour—Escape from such arrest—Conviction for such escape illegal—Act XLV of 1860 *(Penal Code), ss.* 40, 224, 225—*Criminal Procedure Code, ss.* 55, 110, 117, 118.

An order was issued to a police officer directing him to arrest *K* under s. 55 of the Criminal Procedure Code, as a person of bad livelihood. *K*, with the assistance of three others, resisted apprehension and escaped.

Held that *K* was not charged with an "offence" within the meaning of that term as defined in s. 40 of the Penal Code, and that consequently no offence made punishable by s. 224 or s. 225 of the Penal Code had been committed in connection with his evasion of arrest. *Empress* v. *Shasti Churn Napit* (2) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the Crown (appellant).

Mr. *Simeon*, for the respondents.

The Court (MAHMOOD and DUTHOIT, JJ.,) delivered the following judgment :—

DUTHOIT, J.—This is an appeal under the provisions of s. 417 of the Code of Criminal Procedure.

(1) I. L. R. 5 All. 17. (2) I. L. R., 8 Calc 331.

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For its purposes the facts may be thus stated :—

On various dates in September and November, 1883, the police authorities of the Banda district represented that in mauza Khandia there resided Kandhaia and other persons of bad livelihood, and that unless measures for restraining those persons were taken, serious offences against property in the neighbourhood were to be apprehended.

On the 8th December, 1883, an order was issued by Saiad Sadik Husain, a Magistrate exercising first class powers, to the officer in charge of the Police Station of Khunna in the following terms :—

"Charge, s. 55, Act X of 1882.—*Government* v. *Kandhaia*, Brahman, and *Bhawani*, Nai, residents of mauza Khandia.

"After perusal of the Special Diary noted above, and of the order of the Magistrate of the District of Banda, dated the 1st December, 1883, you are hereby directed to send up (*chalan*) the case in due form (*hasb zabta*) with proof in support of it."

On receipt of this order, on the 9th December, 1883, the Head Constable in charge of the Police Station of Khunna gave to Salig Ram, one of the constables of the station, an order in writing directing him to arrest Kandhaia. Armed with this document, Salig Ram arrested Kandhaia. Kandhaia resisted his apprehension, and, with the assistance of Mohan, Paltu, and Sewak, escaped from the grasp of the constable and fled. This is admitted by the learned pleader who has defended the appeal. The evidence for the prosecution goes to show—this, however, is denied by the learned pleader for the respondents—that, in the course of the escape and rescue, Kandhaia struck the constable with a stick, and Mohan, Paltu, and Sewak hustled him. Later in the day, Kandhaia's arrest was effected by a party which came from the police station for the purpose.

On the 17th December, the Magistrate (Saiad Sadik Husain) held that there was no sufficient reason for requiring security for good behaviour to be furnished by Kandhaia and Bhawani. Kandhaia and Bhawani were therefore discharged. But proceedings were immediately afterwards taken against Kandhaia, Mohan, Paltu, and Sewak, with reference to the events of the 9th Decem-

ber, 1883. Evidence on behalf of the prosecution was recorded, and charges were framed in these terms :—

"I, Saiad Sadik Husain, Magistrate, First Class, hereby charge you Kandhaia, Paltu, Mohan, and Sewak, with the following offences :—

"On or about the 10th December, 1883, at mauza Khandia, you Kandhaia committed an offence under s. 224, Indian Penal Code, *viz.*, the offence of escaping from lawful custody, and you Paltu, Mohan, and Sewak, an offence under s. 225, *viz.*, the offence of rescuing Kandhaia from lawful custody, and of offering resistance. Therefore you Kandhaia have committed an offence punsihable under s. 224, and you Paltu, Mohan, and Sewak, an offence punishable under s. 225 of the Indian Penal Code, and these offences are triable by my Court, and I hereby," &c.

The witnesses named by the accused persons for their defence were not summoned; but, on the 25th December, 1883, the case was disposed of by a finding, the substantial portion of which is to the following effect :—

"The police had on former occasions made inquiries regarding Kandhaia accused under s. 55, Act X of 1882, and the Court ordered that the accused should be arrested and sent up with the evidence against him. The police deputed Salig Ram, constable, for the purpose. Kandhaia, accused, after having been arrested by Salig Ram, constable, escaped from custody, and Paltu, Mohan, and Sewak, rescued him. The proceedings instituted under s. 55, Act X of 1882, were struck off by the Court for want of proof, and the accused were acquitted. The pleader for the accused in this case has raised the legal objection that, under ss. 224 and 225, it is necessary that the accused should have been charged with, or convicted, of some offence. Had the accused committed any offence and escaped from lawful custody, or given assistance in rescuing offenders, they could be charged under ss. 224 and 225 of the Indian Penal Code; otherwise they cannot be so charged; and as, under s. 40, Act XLV of 1860, the charge under s. 55, Act X of 1882, does not come within the definition of an offence, it is no offence if Kandhaia accused escaped from custody, or Paltu, Mohan, and Sewak rescued him, even supposing that they

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did so. Moreover, to require a man to enter into recognizances or to furnish security for good behaviour, under s. 55, Act X of 1882, is not one of the punishments prescribed by the Indian Penal Code, nor is it a punishment under any special or local law. This point was discussed on two days. After due consideration, I am also of opinion that the charge under s. 55, Act X of 1882, may result in calling for security for good behaviour, or in requiring a man to enter into recognizances to keep the peace, and this is not one of the punishments prescribed by the Indian Penal Code. Moreover, the charge under s. 55, Act X of 1882, was not proved against Kandhaia accused; the investigations made by the police were useless, and their report was wholly false. When the accused were not charged with or convicted of any offence, no charge can be brought against them under s. 224 or s. 225 of the Indian Penal Code. It is therefore ordered that the accused be acquitted, and the case be struck off the list."

In appeal to this Court, it is contended that the Magistrate was wrong in holding that Kandhaia and the other accused persons did not commit offences punishable under ss. 224 and 225 of the Indian Penal Code respectively, and that, at any rate, they should have been convicted of the offence made punishable by s. 353 of the Indian Penal Code—a section which had been alleged against them by the prosecution.

S. 225 of the Indian Penal Code provides that "whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence..... shall be punished." &c. Unless, therefore, Kandhaia was charged with an *offence*, there could be no valid conviction of him under s. 224 of the Indian Penal Code, nor of his companions under s. 225.

For the purposes of ss. 224 and 225 of the Indian Penal Code, "offence" is defined in s. 40 of that Code (as amended by s. 2, Act XXVII of 1870) as "a thing punishable under this Code, or under any special or local law as hereinafter defined"; and s. 41 defines a "special law" as "law applicable to a particular subject."

Act X of 1882 is therefore a "special law," and it has been suggested that inasmuch as to require security to be furnished in

the terms of s 118 of Act X of 1882 is to cast upon a man a burden which not unfrequently compels him to pay money by way of interest or otherwise, and, in default of discharge of the burden, renders him liable to imprisonment, an order directing a person to furnish security for good behaviour is equivalent to declaring such person guilty of an offence; and that the requirements of s. 40 of the Indian Penal Code are therefore satisfied in the case of a person who has been arrested in the terms of s. 55 of the Code of Criminal Procedure.

We are of opinion that this argument is erroneous; for the Penal Code defines an offence as a "*thing punishable*;" and (*a*) a "*thing*" (*cf.*, ss. 32 and 33 of the Code) must be an *act*, or a series of illegal *acts*, or an illegal *omission*, or a series of illegal *omissions*; or, to use the words of Mr. Bentham, "we give the name of *offence* to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce;" (*b*) "*punishable*" must mean that the commission or omission of the act, the commission or omission of which is prohibited, renders the person who commits or omits it liable to the sanction of the law,—*i.e*, to "punishment."

But, for the purposes of an order under s. 118 of the Code of Criminal Procedure, evidence of the commission or omission of an act is not necessary—proof of general repute (s. 117 of the Code) is all that is required—and the order calling upon a person to furnish security is what Mr. Bentham calls a "preventive remedy," a contrasted with a "penal remedy" or a "punishment." Mr. Bentham defines "*punishment*" as "an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done or omitted;" and he adds:—"An evil resulting to an individual, although it be from the direct intention of another, if it be not on account of some act that has been done or omitted, is not a 'punishment.'" S. 110 of the Code of Criminal Procedure does not set out any act, the omission or commission of which renders the person committing or omitting it liable to punishment; nor ought a Magistrate, when passing an order in the terms of s. 118 of the Code of Criminal Procedure, to have any direct intention of inflicting punishment; for the object

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of s. 118 of the Code of Criminal Procedure is, to use the words of Macpherson, J., in *Umbica Proshad's case* (1), "the prevention, not the punishment, of crime; and, with that object, it authorizes Magistrates to take from certain persons good and sufficient security for their good behaviour. But it is solely for the purpose of securing good behaviour that" the section "can be used; and any attempt to use it for the purpose of punishment for past offences is wrong, and not sanctioned by the law."

We must hold, therefore, that Kandhaia was not charged with an *offence* within the meaning of that term as defined in s. 40 of the Indian Penal Code, and consequently that no offence made punishable by s. 224 or s. 225 of the Indian Penal Code was committed in connection with his evasion of arrest. With the apparent anomaly of providing in s. 55 of the Code of Criminal Procedure for the arrest of the persons described in (*b*) and (*c*) of that section, and of making no provision similar to those of s. 651 of the Code of Civil Procedure, and of s. 225 A. of the Indian Penal Code (s. 9, Act XXVII of 1870), for punishing them for breaking their arrest, we are not here concerned. Our duty is to administer the law as it stands; and we have the satisfaction of noting that the Calcutta Court—*The Empress* v. *Shasti Churn Napit* (2)—has taken the same view of the law as we do.

So much as regards the acquittal under ss. 224 and 225 of the Indian Penal Code.

As regards the omission to try the accused persons on a charge under s. 353 of the Indian Penal Code, we observe that if, in the terms of s. 56 of the Code of Criminal Procedure, an order for the arrest of Kandhaia was given to Salig Ram by his superior officer, and if, in the execution of his duty in carrying out that order, criminal force was used to him, an offence made punishable by s. 353 of the Indian Penal Code was committed by the persons who used such force. We think that the Magistrate should have tried the accused persons under s. 353 of the Indian Penal Code. But the record is at present incomplete, as the witnesses for the defence have not been examined. We reverse the finding of acquittal, and direct a re-trial of the accused on a charge under s. 353 of the

(1) 1 Calc. L. R., 271. (2) I. L. R., 8 Calc. 331.

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Penal Code by the Magistrate of the Banda District, or by such other competent Magistrate of that district, other than Saiad Sadik Husain, whom the Magistrate of the District may nominate for the purpose.

APPELLATE CIVIL.

1884 *August 7.*

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

GHAZIDIN (DECREE-HOLDER) *v.* FAKIR BAKHSH (JUDGMENT-DEBTOR).*

Execution of decree—Civil Procedure Code, ss. 243, 244 (c), 545—Order in stay of execution a matter "relating to execution" of decree—Order appealable—Order restoring judgment-debtor to possession after execution—Order illegal.

The provisions of s. 244 of the Civil Procedure Code govern equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. *Cooke* v. *Biseeba Beebee* (1) referred to.

All orders staying execution of de crees, whether passed by the Court which passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s. 244 (*c*) of the Civil Procedure Code, and, as such, appealable, irrespective of the provisions of s. 588. *Kristomohiny Dossee* v. *Bama Churn Nag Chowdry* (2) and *Luchmeeput Singh* v. *Sita Nath Doss* (3) followed.

The widest meaning should be attached to clause (*c*) of s. 244 of the Civil Procedure Code, so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree and relating to its execution.

There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of s. 243 of the Civil Procedure Code have no reference to a case in which execution has already been carried out, and the decree-holder placed in possession of the property decreed to him.

On the 24th December, 1883, Chauharja Bakhsh Singh and others, mortgagors, obtained in the Court of the Subordinate Judge a decree against Fakir Bakhsh, mortgagee, for redemption of mortgage and possession of the mortgaged lands, conditioned on their depositing in Court Rs. 3,328 within one month from

* First Appeals Nos. 24 and 25 of 1884, from orders of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 4th March and 18th March, 1884.

(1) N.-W. P. H. C. Rep., 1874, p. 181.

(2) I. L. R., 7 Calc. 733.

(3) I. L. R., 8 Calc. 477.

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the date of such decree. The decree-holders fulfilled the above-mentioned condition by paying the required amount into Court on the 8th January, 1884, and on the 22nd February, 1884, they applied to execute their decree by giving them possession. On the same day, an order was passed for delivery of possession, and, on the 4th March, 1884, the Amin forwarded a *dakhal-nama* reporting that possession had been given to the decree-holders, which reached the Court on the 6th of the same month. Meanwhile, on the 29th February, the judgment-debtor, intimating his intention to appeal to the High Court from the decree of the 24th December, 1883, and expressing his readiness to furnish security, had applied to the Court for stay of execution "till the expiry of the time allowed for appeal, or the final disposal of the appeal," and on the 4th March, 1884, the following order was passed:—"That under s. 545 of Act XIV of 1882 the execution-proceedings be stayed, provided that the applicant furnishes security to the extent of one year's profits on or before the 14th March, 1884, and that as an order has already been issued for the execution of the decree, a second order be issued directing the Amin to stay the proceedings of the delivery of possession till further orders, and to submit a report to the effect that these orders have been carried out." It will be noticed that this order was made on the same day as that on which the Amin reported to the Court that possession had been given to the decree-holders. The second order reached the Amin on the 8th March, 1884, and he reported what had already been notified, namely, that he had already given possession. On the 18th March, that is, four days beyond the time named in the order of 4th March, the judgment-debtor deposited Rs. 370-6-0 as representing one year's profits; and thereupon the Subordinate Judge ordered that the judgment-debtor be restored by the Amin to possession. From this order of the 18th of March, and the former order of the 4th of March, Ghazideen, one of the decree-holders, now appealed to the High Court.

Munshi *Hanuman Prasad* and Munshi *Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath* and the *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the respondent.

The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) delivered the following judgment:—

MAHMOOD, J.—We have not yet entered upon a consideration of the pleas, as a preliminary objection to our entertaining the appeal has been taken by the learned pleader for the respondent. His contention in substance is, that the orders of the 4th and 18th March having been passed in advertence to the second paragraph of s. 545 of the Code, and not being orders in execution, but in stay of execution of the decree, were not within s. 244, and not being specially appealable under s. 588 are not appealable at all. And it is further urged by him that an application to stay execution is in terms a prohibition to the applicability of s. 244, and, it is said, how can such an application involve any question "relating to the execution" of the decree within the meaning of clause (*c*) of that section, when its very object is to suspend execution?

We have taken time to consider the contention, which at first sight seemed somewhat plausible, but, on consideration, we think its force is more apparent than real. It seems to us that the argument rests upon an erroneous construction of the expression "Court which passed the decree" in s. 545 of the Code, and a too limited view of the scope of s. 244.

The chapter on execution of decrees in the Civil Procedure Code begins with s. 223, the first paragraph of which lays down the general rule that "a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution;" and s. 228 lays down that "the Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself." It is clear from these provisions that the functions of "*the Court executing a decree*" may be discharged either by the Court which passed it or by the Court to which the decree has been transferred for execution; and, in order to prescribe the scope of those functions, s. 244 defines the questions to be "determined by order of the Court executing a decree, and not by a separate suit." The provisions of the section are general, and they certainly do not aim at drawing a distinction between "the Court which passed the decree"

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and "the Court executing it," for both qualifications may be possessed by the same Court.

The subject of staying execution of decree is dealt with in the Code in two separate places; but this circumstance does not involve the soundness of the proposition relied upon by the learned pleader for the respondent, that an order staying execution does not fall within the purview of the general section 244, which, as we have shown, governs equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. In connection with this subject, ss. 239, 240, 242, and 243 must be read with ss. 545 and 546, and indeed they might perhaps have more properly appeared together and in the same part of the Code. The use of the phrase "Court which passed the decree" in s. 545 does not of itself necessarily exclude the Court executing the decree, for it may itself be such Court; but it does exclude the Court to which execution of a decree has been transferred, for that Court is not the Court which passed the decree. In other words, it does not follow as a necessary consequence from the application under the second paragraph of s. 545 for stay of execution, having to be made to the "Court which passed the decree," that such application must be something other than a matter "relating to the execution" within the meaning of s. 244 (*c*). And this construction is supported by the fact that s. 239 of the Code provides for cases in which, though a decree has entered upon the stage of execution, after its transfer to another Court, the Court that passed it, *qua* such Court, has still power to order stay of execution, or to make any order relating to the decree or execution, which might have been made by itself if it had issued execution, or if application for execution had been made to it; and any order it may pass "in relation to the execution of such decree" shall be binding on the Court to which the decree was sent for execution (s. 242). To put the matter briefly, it may be said that the transfer of a decree to another Court for execution, amounts to a *qualified* delegation of the powers possessed by the Court that passed the decree, in discharging its functions relating to the execution of that decree. Such delegation is, however, not complete, nor does it entirely divest the Court which transfers the decree of its powers and func-

tions "in relation to the execution of such decree," for under ss. 239 and 242, the higher authority in some matters still rests with that Court, notwithstanding the transfer. Indeed a comparison of the various sections shows that the powers as to stay of execution conferred by ss. 545 and 546 upon the Court which passed the decree are analogous to similar powers conferred by ss. 239 and 240 upon the Court to which the decree is sent for execution, both such Courts having in common the qualification of being "the Court executing a decree," within the meaning of s. 244. The powers are similar in kind, though different in minor details. Indeed, so strong is the analogy, that the provisions of s. 243, which relate to stay of execution pending suit between the decree-holder and the judgment-debtor, would seem to be common both to the Court which passed the decree and the Court to which it is sent for execution. Such was the ruling of this Court in the case of *Cooke* v. *Hiseeba Beebee* (1).

For these reasons, the argument of the learned pleader for the respondent fails, so far as it aims at drawing a generic distinction between orders staying execution passed by the Court which passed the decree and similar orders passed by the Court to which the decree is sent for execution. Nor do we think that the second part of the learned pleader's argument is sound. It is true that the object of an order staying execution is to *suspend* execution, but this circumstance is far from showing that such an order is not a question "relating to the execution" of the decree within the meaning of s. 244 (*c*) of the Civil Procedure Code. If the argument were sound, *a fortiori* would the proposition be true that an order dismissing an application for execution as barred by limitation is a matter not "relating to the execution of the decree," for whilst, in the one case, execution of the decree is temporarily suspended, in the other it is absolutely prohibited; and, whilst the learned pleader does not go to the extent of contending that the latter proposition is tenable, his argument falls short of explaining the anomaly which the logical consequence of his reasoning involves.

We have, therefore, no hesitation in holding that all orders staying execution of decrees, whether passed by the Court which

(1) N.-W. P. H. C. Rep., 1874. p. 181.

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passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s. 244 (*c*), and, as such, appealable, irrespective of the provisions of s. 588 of the Civil Procedure Code. Such was the view taken by the Calcutta High Court in *Kristomohiny Dossee* v. *Bama Churn Nag Chowdry* (1) in connection with an order staying execution under s. 243; and again in *Luchmeeput Singh* v. *Seeta Nath Doss* (2) which was an appeal from an order made by the Court which passed the decree, and in which the execution was pending, requiring the decree-holder to give security under the provisions of s. 546 of the Civil Procedure Code. It is hardly necessary to add that the *ratio decidendi* of these two rulings is equally applicable to a case like the present, wherein the orders under appeal purport to have been made under s. 545 of the Code.

We are of opinion that the widest meaning should be attached to clause (*c*) of s. 244, so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree, and relating to its execution. And as a result of this view, we shall hear these cases on the merits of the pleas urged in appeal.

[The Court, after hearing the cases, was of opinion that the pleas urged in appeal must prevail, and continued as follows:]—

It appears that before the order of the 4th March, 1884, was passed, the order of the Subordinate Judge, dated the 22nd of February, 1884, had already been carried out by the Amin, and possession of the decreed property had already been delivered to the decree-holder-appellant. The decree had, therefore, been already executed, and the order of the Subordinate Judge, dated the 18th March, 1884, directing that the judgment-debtor be restored to possession, was therefore illegal. There is no provision in the law which empowers the Court passing the decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of the decree. The provisions of s. 243 of the Civil Procedure Code are limited to staying

(1) I. L. R. 7 Calc. 733. (2) I. L. R. 8 Calc. 477.

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execution of decrees, and they have no reference to a case like the present, in which execution had already been carried out; and the decree-holder placed in possession of the property decreed to him. The same principle would apply to the case of a money-decree which had already been satisfied in execution. Indeed, an order such as the order of the 18th March in this case cannot be described as an order *staying* execution of a decree, for the execution had already taken place.

Upon the application of the decree-holder-appellant this Court, by its order of the 20th March, 1884, stayed the Subordinate Judge's order of the 18th March, and the decree-holder is therefore still in possession, and the decree under which he obtained possession is the subject of an appeal which is now pending in this Court.

Under the circumstances of this case, we decree both the appeals, and set aside the lower Court's orders, dated the 4th and 18th March, 1884; costs in both the Courts to be paid by the judgment-debtor-respondent.

Appeals allowed.

FULL BENCH.

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Before Mr. Justice Straight, Offg Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

DAMODAR DAS (PLAINTIFF) *v.* GOKAL CHAND AND OTHERS (DEFENDANTS).

Practice—Civil Procedure Code, s 53—Rejection etc. of plaint at a date subsequent to first hearing.

Held (OLDFIELD, J, dissenting) that, under s. 53 of the Civil Procedure Code, a plaint can be rejected, returned for amendment, or amended by the Court of first instance only at or before the first hearing of the suit, and not after the first hearing thereof.

Modhe v. *Dongre* (1) dissented from:

Soorjmukhi Koer's Case (2), *Burjore* v. *Bhagana* (3), and *Fazul un-nissa Begam* v. *Mulo* (4) distinguished by MAHMOOD, J

Per MAHMOOD, J —The plaint may, for causes other than those mentioned in s. 53, be amended by the Court after the first hearing.

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* Second Appeal No. 1274 of 1883, from a decree of J. C. Leopolt, Esq, District Judge of Agra, dated the 26th July, 1883, affirming a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Agra, dated the 6th June 1882.

(1) I. L R., 5 Bom. 609

(2) I. L R, 2 Calc. 272

(3) I L R., 10 Calc. 557, L R., 11 Ind. Ap. 7.

(4) I. L. R, 6 All. 250.

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This was a reference to the Full Bench. The facts which gave rise to it were as follows:—The plaintiff claimed to have it declared that a certain house was not liable to be sold in execution of three decrees against one Shadi Lal, from whom he had purchased the house, and to have the property released from attachment in execution of those decrees. When the house had been attached in execution of those decrees, the plaintiff had objected to the attachments, but his objections were disallowed. The defendants in the suit were the holders of the three decrees and the judgment-debtor. The 29th August, 1881, was fixed for the first hearing of the suit. On or before that date all the defendants except Shadi Lal filed written statements. The holders of one of these decrees, defendants, set up as a defence to the suit, among other things, that the frame of the suit was bad for misjoinder of causes of action, the causes of action against the holders of each decree being separate. On that date the Court of first instance framed the following issue on this defence:—"Whether this suit is bad for misjoinder?" On this issue it held subsequently, on the 6th June, 1882, at the final hearing of the suit, that the frame of the suit was bad for misjoinder of causes of action, and made an order rejecting the plaint on that ground. On appeal by the plaintiff the lower appellate Court affirmed the order of the first Court. The plaintiff appealed to the High Court, contending, *inter alia*, that "after a plaint had been admitted, and the written statements of the defendants filed, the plaint could not be rejected."

The Divisional Bench (STRAIGHT, Offg. C. J., and DUTHOIT, J.) hearing the appeal, by an order dated the 21st April, 1884, referred the following question to the Full Bench:—

"May a plaint be rejected on any date subsequent to the first hearing?"

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad* and Shaikh *Maula Bakhsh*, for the respondents.

The following opinions were delivered by the Full Bench:—

OLDFIELD, J.—In my opinion, the words "at or before the first hearing" in s. 53 of the Civil Procedure Code are directory

only, and allow of a discretion, of course to be properly exercised, of rejecting or amending a plaint after the first hearing.

In *Burjore* v. *Bhagana* (1) the Privy Council ruled that the words in s. 602 of the Civil Procedure Code, directing that security for costs shall be given within a certain time specified in the section, are only directory, and that the Court has a discretion to extend the time, and this ruling was followed by the Full Bench of this Court in *Fazul-un-nissa Begam* v. *Mulo* (2).

The question raised in those cases is analogous to the one now before us, which was decided by the Bombay High Court in *Modhe* v. *Dongre* (3), and I concur in the view of the law expressed by that Court.

STRAIGHT, Offg. C. J., and BRODHURST and DUTHOIT, JJ.—In our opinion the question referred to us must be answered in the negative. We think that the words "at or before the first hearing" in s. 53 of the Civil Procedure Code are mandatory and not directory, and that a plaint cannot be "rejected," "returned for amendment," or "amended then and there" by a Court after the first hearing. It will be convenient in dealing with the point before us, to see how the law stood with respect to the same subject-matter under Act VIII of 1859. By ss. 29 and 32 of that statute, it was provided that "if the plaint do not contain the several particulars hereinbefore required to be specified therein, or if it contain particulars other than those required to be specified, whether relevant to the suit or not, or if the statement of particulars be unnecessarily prolix, or if the plaint be not subscribed and verified as hereinbefore required, the Court may reject the plaint, or, at its discretion, may allow the plaint to be amended." S. 32: "If upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. Provided that the Court may in any case allow the plaint to be amended, if it appear proper to do so." By ss. 30 and 31 of the same Act, provisions were made similar to those to be found now in ss. 54 and 57 of the present Code, and all orders passed under

(1) I. L. R. 10 Calc. 557; L. R., 11 Ind. Ap. 7.
(2) I. L. R., 6 All. 250. (3) I. L. R., 5 Bom. 609.

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the sections of the old Code above referred to were appealable as orders, while, under the former, orders returning plaints for amendment, or to be presented to the proper Court, are appealable as such, orders of rejection being appealable as decrees. It will be observed that the language used in s. 29 of Act VIII of 1859 was general and without restriction, and the consequence was that much room was left for doubt, and a diversity of conflicting views were taken as to what was the proper stage at which to reject or return a plaint for amendment. Hence it had become desirable, when Act X of 1877 was in course of preparation, to lay down some clear and imperative rule of practice by which uniformity of procedure in this important respect on the part of the Courts could be secured. Except for a ruling of the late Chief Justice of Bombay, to which we will presently advert, and the opinion now expressed by our honorable colleague, Oldfield, J., we should have thought that the language of s. 53 of the present Code is only open to one construction, namely, that it exactly meets the difficulty at which it was aimed: otherwise why not have retained the general terms of the old Code? If the Legislature, in reproducing a provision of a repealed Act into a new law, accompanies it by certain limitations and restrictions, it is, we should think, to be presumed that it did not go out of its way to introduce terms which were intended to have neither meaning nor effect. Let us see what s. 53 says: "The plaint may, at the discretion of the Court, and at or before the first hearing, be rejected, &c." Now, as we have already remarked, if the discretion of the Court herein mentioned was meant to be exercisable at any time, why not have adhered to the language of Act VIII of 1859; or, if that required improvement, why not have adopted the same expression as is used in s. 149, "at any time before passing a decree;" or, to go further afield, have adopted the rules of Order 27 of the Judicature Act? It comes to this, that those who contend for the affirmative answer to the question put by this reference, virtually ask us either to run a pen through the words "at or before the first hearing," or to treat them as mere surplusage. But we do not think it is competent for us to construe a section of a legislative enactment in this loose fashion, or to leave out a whole section as having no particular meaning. To do so would be to violate

the cardinal rule of construction referred to by Cockburn, C. J., in *R.* v. *Bishop of Oxford* (1) "that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." But then, it is said, the introduction of the words "may at the discretion of the Court" qualifies the whole of s. 53. To our minds this is a fallacious argument. Used as a term in legislation, there is no special magic about the word "may;" with one context it may be merely directory, with another absolutely imperative. Nor does the expression "discretion of the Court" carry matters further; and it would have been equally apposite to say "if the Court sees fit." The words "may at the discretion of the Court" were obviously only used for the purpose of conferring a power on the Courts, which without them they would not have had, of determining whether, assuming a plaint to be defective in any of the respects mentioned in clauses (*a*), (*b*), (*c*), (*d*). (*e*), and (*f*), it should be (i) rejected, or (ii) returned for amendment, or (iii) amended then and there, as contradistinguished from the obligation cast upon them to reject or return a plaint in the cases provided for in ss. 54 and 57. Looking to the terms of s. 53, we gather that its object was to enable a Court, according as the plaint was more or less open to objection upon the face of it, either of its own motion or at the instance of the defendant on his first appearance, to summarily deal with it in a preliminary stage by one or other of the above three alternatives. In short, the expression "may at the discretion of the Court" amounts to no more than saying "it shall be lawful for the Court," or the Court "may, if it think fit," and beyond this it has no special significance or effect upon the rest of the section. The discretion of the Court must of course be that discretion which is described in s. 22 of the Specific Relief Act as "not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of Appeal." It cannot, we think, be contended that a Court, except as provided in s. 53, which, by the way, finds its place in the Chapter relating to "Institution of Suits," has any authority to reject or to return a plaint for amendment, or to amend it; and, as far as we are aware, when once a suit has entered upon the stage of

(1) L. R., 4 Q. B. 245.

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trial, it can only be disposed of by judgment and decree. If this be so, then in order to enable us to answer this reference in the affirmative, we must interpret not only the words "may at the discretion of the Court," but those which immediately follow and apparently govern them, "and at or before the first hearing" as conferring a general and unlimited power irrespective of all consideration of time. Surely when a time is expressed *at or before* which a discretion may be exercised, it is only following another well-known rule of construction to hold that this excludes the notion that, save in specially excepted instances, it may be exercised afterwards. If this is not so, then at what stage of a suit may a plaint be rejected, returned for amendment, or amended? for, if no time is provided, then it may be done at any time.

But we can quite understand, indeed we have already explained, why it was considered undesirable to leave the Courts unfettered discretion in such a matter. No doubt the Legislature felt the confusion and inconvenience that had arisen before and would arise again, if no clear and certain time were fixed within which the power conferred by s. 53 could be used. For instance, if there were no limitation, a Court might—though of course such an exercise of its discretion would be most unreasonable—after accepting the plaint, receiving the statement of defence, settling the issues and hearing the witnesses on both sides, reject the plaint, or return it for amendment on the ground of prolixity, or for misjoinder of causes of action, or for nonjoinder or misjoinder of parties, s. 34 notwithstanding, or for not being signed and verified. And with what result? In the one case, the rejection would be appealable as a decree, but such appeal could only deal with the propriety or otherwise of the exercise of the Court's discretion in rejecting; in the other, the return for amendment would be appealable as an order upon like grounds; but, in both instances, the disposal of the suit in the main and upon its merits would be suspended while these quasi-interlocutory proceedings were pending. We cannot believe that it was ever intended to admit of such a state of things arising; on the contrary, in our opinion, the authority given to the Court was meant to be exercised at a preliminary stage to, and not in the course of the trial of, a suit. Moreover, we are fortified in this view by an examination of the

grounds on which a plaint may be rejected, returned for amendment, or amended, as declared in the sub-clauses, (*a*), (*b*), (*c*), (*d*), (*e*), and (*f*). It will be observed that these have reference to technical defects in the form of the plaint of a legal character, and are not concerned with the matters in difference between the parties to the suit.

As we have before remarked, when a Court exercises its discretion under s. 53, the appeal from its decision must be confined to the question of whether, looking to the plaint itself, such discretion has been properly exercised, and the merits of the case cannot be examined. We may perhaps not inappositely add that in the later section of the Code (543), which deals with the rejection or amendment of a memorandum of appeal, no limitation as to the time when that may be done is provided,—a circumstance that is not without significance.

We have thus briefly given the reasons that induce us to regard the language of s 53 as imperative, and to hold that a plaint cannot be rejected, returned for amendment, or amended, after the first hearing. But before closing our judgment we feel bound to make one or two remarks with regard to a ruling of the Bombay Court, which, as an expression of opinion by the late Chief Justice of Bombay, demands attention. With deference to that learned Judge, we confess we do not feel ourselves pressed by the main argument on which he proceeds, namely, that the adoption of our view brings cl. (*f*) of s. 53 and the second paragraph of s. 32 into conflict. No doubt it is right to presume that the Legislature did not intend to make two provisions in the same Act which contradict one another. But is such the case in the two sections before us? Paragraph 2 of s. 32 gives a general power to a Court at any time, of its own motion, or on application, to order "that any plaintiff be made a defendant," or *vice versâ*, "and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." S. 53, on the other hand, provides that a Court may, in its discretion and at or before the first hearing, reject or return for amendment or amend

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a plaint which, upon the face of it, shows nonjoinder or misjoinder of parties. These seem to us to be two totally different things; in the one case, the Court, so long as it does so "at or before the first hearing," must, if it properly exercises its discretion, either reject or return for amendment, or then and there amend the plaint, if it presents the defects mentioned in s. 53: in the other, it only alters the position of a party or parties to the suit, or adds a plaintiff or defendant, and, in such last mentioned instance, as the person appears for the first time, if the plaint is amended, so far as he is concerned, under s. 33, any such amendment as regards him will be "at the first hearing." But, even if there be a conflict, which we do not concede, it does not appear to us that, because the provisions of paragraph 2 of s. 32 are *pro tanto* inconsistent with those of s. 53, it necessarily follows that the words "at or before the first hearing" in the latter section are robbed of their significance and importance, any more than the same words in paragraph 4 of s. 32 are to be treated as surplusage. But as we have said, it seems to us that a distinction is to be drawn between rejecting, returning for amendment, or amending a plaint at or before the first hearing for nonjoinder or misjoinder of parties, patent on the face of it, or then known to the plaintiff or the Court, and another to change the position of a plaintiff or defendant, or to add a party inadvertently omitted, or whose presence is necessary for the object mentioned in s. 32. Giving the terms of s. 53 the best consideration we can, we find ourselves unable to coincide in the construction placed upon them by the two learned Judges of the Bombay Court. We think it more reasonable to suppose that when the Legislature introduced the words "at or before the first hearing" into the section, they were intended to have some meaning, and that the meaning they would ordinarily bear in the English language.

As to the ruling of their Lordships of the Privy Council referred to by Oldfield, J., we have had the advantage of perusing the remarks made in reference thereto by Mahmood, J., and we entirely concur in his observations and in the distinction he draws between ss. 602 and 53 of the Code. It is therefore unnecessary for us to say anything further on the subject, and it only remains for us to add that the question put by the reference must be answered in the negative.

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MAHMOOD, J.—The question put to us in this case, though expressed in general terms, is whether, under s. 53 of the Civil Procedure Code, a plaint may be rejected at any time subsequent to the first hearing of the suit; and, in considering this question, I have arrived at the same conclusion as the learned Chief Justice.

The words of s. 53, important for the consideration of the question, are:—"The plaint *may*, at the discretion of the Court, *and at or before the first hearing*, be rejected or returned for amendment within a time to be fixed by the Court, or amended then and there," &c. Did the Legislature intend the words which I have emphasized to be merely directory or mandatory? It has been said that when a time is fixed by a statute for the performance of any act or the exercise of any power, such fixation of time must be taken to be only directory, unless followed by express words prohibiting the performance of such act or the exercise of such power after the expiry of the time so fixed. And for this contention certain passages to be found at pp. 207-9 of Mr. Wilberforce's work on Statute Law have been referred to. One of these passages was quoted by Field, J., in the case of *Abasu Begam* v. *Umda Khanum* (1), in support of the view that the provisions of s. 492 of the Criminal Procedure Code of 1872, relative to the form of summons, were merely directory and not imperative. But neither the passage cited nor the ruling seems to me to be applicable to the present case, for the question before us is not one of mere form, nor does it relate to the manner in which official acts are to be performed. The point before us is one of much greater importance, for the interpretation of the statute in this case cannot be determined merely by the consideration that substantial compliance may be taken as full compliance.

By what considerations then should the interpretation of the statute be guided and determined in the present case? Before entering into the main question, I wish to premise that I take it as a sound explanation of law that "enactments regulating the *procedure in Courts* seem usually to the imperative, and not merely directory. If, for instance, an appeal from a decision be given, with provisions requiring the fulfilment of certain conditions, such as giving notice of appeal and entering into recognizances, or transmitting do-

(1) I. L. R., 8 Calc. 724.

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cuments within a certain time, a strict compliance would be imperative, and non-compliance would be fatal to the appeal."—(Maxwell on the Interpretation of Statutes, 2nd ed., 456). The rule of interpretation which governs the construction of words conveying a directory meaning was comprehensively stated by Lord Selborne in *Julius* v. *Lord Bishop of Oxford* (1): "The question whether a Judge or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power." Such then is the broad principle of interpretation, and, to use the language of Marcey, J., "the general rule is that where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the *nature of the act* to be performed or the *language* used by the Legislature show that the *designation of the time* was intended as a *limitation* of the power of the officer." Such an inference as is suggested in the last lines of the passage first quoted was drawn by the Court where a time was appointed for the taxation of costs upon petitions against private bills, and for the approval by the quarter sessions of the table of fees to be taken by clerks to justices. In both these cases, the provision as to time was held to be imperative, and non-compliance with it rendered the taxation of costs and the table of fees invalid. (Wilb., Stat. Law, p. 208.)

I agree with my brother Oldfield, so far as to concede that the words of the section, if interpreted regardless of any other consideration, would not necessarily import an absolutely imperative signification so as to invalidate the rejection of a plaint by the Court after the first hearing of the suit. But, in my opinion, the question cannot be so decided, and, as Lord Selborne said, it must be solved *aliunde* and with reference to the general scope and objects of the enactment. And, taking the *dictum* of the learned Lord with the rule laid down by Marcey, J., I formulate three questions as steps leading to the determination of the point now before us :—

(i) What does the *language* and context of s. 53 indicate ?

(1) L. R., 5 App. Cas. 214, see p. 235.

ii) What are the general *scope* and *objects* of the particular provisions contained in that section?

(iii) Is the *nature* of the act, that is, the power conferred upon the Court by the section, such as would warrant the conclusion that the phrase "*at or before the first hearing*" was intended to be a limitation of the power so conferred?

First, then, as to the *language* and context of the section. The word "*may*," as a general rule, no doubt, imports a permissive meaning; but the rule is not universally applicable regardless of the context of the statutory provisions, and the objects with which they have been enacted. "Where a statute directs the doing of a thing for the sake of justice or public good, the word '*may*' is the same as the word '*shall*.'" Such was the rule laid down by Cockburn, C. J., in *R.* v. *Bishop of Oxford* (1). Again, to use the words of Jervis, C. J., in the case of *Macdougal* v. *Paterson* (2): "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises. The word '*may*' is not used to give a discretion, but to confer a power,"—(Wilb., Stat. Law. pp. 196-7.) In enacting that they "*may*," or "shall, if they think fit," or "shall have power," or that "it shall be lawful for them to do such acts, a statute appears to use the language of mere permission; but it has been so often decided as to have become an axiom that in such cases such expressions may have—to say the least—a compulsory force, and so would seem to be modified by judicial exposition."—(Max. on Int. of Stat., 2nd ed., p. 287.) What, then, should be the judicial exposition of the meaning of the word "*may*" as it occurs in s. 53 of our Civil Procedure Code? Having considered the question, I hold that the word, as it occurs in the section, does not mean more or less than the equivalent phrase "*it shall be lawful*," that is, the word is used to confer a power which the Court would not otherwise have, and the phrase "at the discretion of the Court" precludes an absolutely imperative signification being attached to the word. But is the discretionary power so conferred to be wholly unrestricted either as to the *circumstances* under which, or as to the *time* within which, it is to be exercised? My answer to the question is, that s. 53 does not

(1) L. R., 4 Q. B. 245. (2) 11 C. B. 773.

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contemplate the discretionary power to be so unrestricted in either of these respects. There is no question that in respect of one of these considerations, cls. (*a*) to (*f*) of the section limit the scope of the discretionary power, for it is not contended that the Court could summarily reject a plaint under circumstances other than those specified in the clauses. But it is said that the absence of the words "but not afterwards" must be taken to imply that no such restriction as to time was contemplated by the Legislature. But if the Legislature intended to impose restrictions as to the *circumstances*, why should the discretionary power be regarded as unrestricted as to *time*? For, it seems to me, the argument based upon the absence of negative words, is applicable alike to the one limitation as to the other; and if the word "*may*" and the phrase "*at the discretion of the Court*" are allowed to impair the limitation as to time contained in the phrase "*at or before the first hearing*," they should also, as a logical consequence, be allowed to reduce the limitation as to *circumstances* contained in the various clauses of the section, from being essential conditions for the exercise of the discretionary power, to mere suggestions which the Court may exceed or disregard. I am unable to place any such construction upon the words of the section, for, as I shall presently show, such an interpretation would be inconsistent with the very objects of the enactment.

But it is contended that a phraseology similar to that of s. 53 has been employed in ss. 110 and 111 of the Civil Procedure Code, and that, in both those cases, the only reason why the tendering of written statements, as a matter of right, is restricted to the first hearing is, that s. 110 is qualified by negative words contained in s. 112, and that s. 111 employs the words "*but not afterwards.*" The argument has only apparent force, for it seems to me that, in both the cases so pointed out, the introduction of the negative words was necessary, not because the main propositions as to limitation of time absolutely needed such negative words, but because the exigencies of drafting required the employment of those words in order to facilitate the introduction of the qualifications which s. 112, on the one hand, and the latter part of the first paragraph of s. 111 on the other, were intended to attach to the rules contained in those sections. In both cases, the right of

the parties to tender written statements after the first hearing is taken away, in both cases discretionary power is expressly conferred upon the Court to relax the rule. The exigencies of s. 53 required no such provisions, and no argument based upon the wording of the sections to which I have referred can apply to the interpretation of the section we are called upon to construe. There are, however, other sections of the Code which may more appositely be referred to for the purposes of comparison, for s. 53 is not the only clause of the Code which would bear the kind of interpretation which I am disposed to place upon that section. Similar restriction as to time is to be found in s. 328, which relates to the right of the decree-holder to complain of resistance or obstruction to the execution of his decree. The words are: "the decree-holder *may* complain to the Court *at any time within one month* from the time of such resistance or obstruction." Is the limitantion of time in that section to be understood as merely directory or as mandatory? Is it to be considered as directory merely because the words "but not afterwards" are absent from the section? It seems to me that, notwithstanding the use of the word "*may*," and notwithstanding the absence of negative words, the restriction as to time must be taken to be imperative—imperative in the sense of prohibiting the adoption of the procedure provided by that section for the decree-holder, if he allows the specified period to elapse. The limitation of time in *that* section is perhaps misplaced, but, in support of my view, I resort to the well recognized rule of interpreting statutes by comparison of statutory provisions *in pari materia*, and I find that art. 167, sch. ii of the Limitation Act (which relates to the same matter), taken with the provisions of s. 4 of the Act, leaves no room for doubting the proposition that applications under s. 328 of the Civil Procedure Code cannot be entertained after the expiration of the period of one month therein specified, unless indeed the rules of computing the period of limitation in themselves permit an extension of the time. I wish to refer to another section of the Civil Procedure Code which, whilst employing the word "*may*," specifies a limitation of time within which parties to a case are allowed to exercise a right conferred upon them by the statute. S. 567 provides that either party to an appeal "may, within a time to be fixed by the appel-

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late Court, present a memorandum of objections to the finding" recorded by the lower Court upon remand of issues. In interpreting the corresponding s. 354 of the old Code (Act VIII of 1859), which was similarly worded, a Full Bench of this Court in *Ratan Singh* v. *Wazir* (1) held that, after the expiry of the period fixed for filing objections, neither party could as a matter of right claim to be heard, but that the Court had discretion to allow such objections even after that period. The rule so laid down has never been departed from by this Court, and the same interpretation has been placed upon s. 567 of the present Civil Procedure Code. But it is suggested that the interpretation so placed upon the section, far from supporting my view, is calculated to support the contrary opinion; because there the Court was held to have discretion to extend the period. In answer to this, I have only to say that the limitation of time in that section was obviously meant to be a restriction upon the rights of the parties, and not upon the discretion of the Court; and I say with emphasis that the ruling is a distinct authority for the proposition that such restriction of time was held to be imperative, notwithstanding the use of the word "*may*," notwithstanding the absence of words which could import the meaning of the phrase "but not afterwards." In that section, there was nothing to show that any restriction as to time was intended to be imposed upon the discretion of the Court—the Court that could fix the time could also extend it. But the distinction which I have thus drawn leads me to the consideration of another section of the Code to which my brother Oldfield has referred, and in which limitation of time is specified for the performance of certain acts to be done by the party preferring an appeal to Her Majesty in Council. The section is 602 of the Civil Procedure Code, the *ipsissima verba* of s. 11 of Act VI of 1874. The section provides that "if the certificate be granted, the applicant *shall, within six months* from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, give security for the costs of the respondent," and do certain other acts mentioned in the section. In the case of *Soorjmukhi Koer* (2) a Bench consisting of the learned Chief Justice and wo other learned Judges of the Calcutta High Court, interpreting

(1) I. L. R., 1 All. 165. (2) I. L. R., 2 Calc. 272.

the words which I have quoted, held that the phrase "shall within six months" did not import an absolutely imperative meaning, and the time named in the section was subject to extension by the sound discretion of the Court. The rule so laid down was adopted by the Lords of the Privy Council in *Burjore* v. *Bhagana* (1), which was followed by a Full Bench of this Court in *Fazul-un-nissa Begam* v. *Mulo* (2). The rulings are undoubtedly strong authorities that the limitation as to time within which a party to the suit had to perform certain acts was merely directory, and did not exclude the discretion of the Court to extend the time, even though the words of the statute importing such limitation were preceded by the word "*shall*"—a word which is usually interpreted to be imperative, whilst "*may*" is of course ordinarily taken to be permissive only. The ruling of the Privy Council, so far as the interpretation of the limitation as to time in s 602 is concerned, has undoubtedly settled the law. The observations of their Lordships upon the point, as well as of the learned Judges of the Calcutta Court in the case approved by the Privy Council, are briefly expressed, and I confess that the rulings kept my mind in suspense for some time in regard to the question whether they did not absolutely govern the interpretation of s. 53 also. But having given my earnest consideration to the subject, I am unable to agree with my brother Oldfield in thinking that they solve the difficulty now before us. I distinguish the wording of s 53, relating to the limitation of time, from the language of s. 602, and my reasons for the distinction are similar to those which I have expressed in connection with the interpretation of s. 567 by this Court. The restriction as to time contained in that section, as also in s. 602 of the Code, are restrictions upon the rights of the parties, and the rulings to which I have referred are therefore consistent with the principle whereon the Full Bench ruling of this Court proceeded in interpreting s. 354 of the Code of 1859. In neither of the sections does the language of the statute employ any phrase which could be taken to be a restriction imposed upon the powers of the Court, whilst in s. 53 the adverbial clause "*at or before the first hearing*," if it has any meaning, must refer to the power of the Court—it certainly cannot refer to anything else. But this is not

(1) I. L. R., 10 Calc. 557; L. R., 11 Ind. Ap. 7. (2) I. L. R., 6 All. 250.

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the only reason why I distinguish the present case from the Privy Council ruling in *Burjore* v. *Bhagana* (1). I have already said that the scope and objects of particular statutory provisions, and the nature of the act to which they relate, are essential considerations for arriving at correct conclusions in construing the language of the Legislature. That those considerations affect the present question, I shall presently endeavour to show. But I may here say in passing that, both in the case before the Calcutta Court and in that before the Privy Council, there had already been substantial compliance with the spirit and objects of the statute. In the former case, deposit of costs within time could not be made, because the day for making the deposit fell at a time when the Court was closed, and, in the case before the Privy Council, a deposit within time had already been made or was attempted to be made within time, but it was by a *bonâ fide* mistake wrongly made in the Court of first instance—a state of things which even the rigid rules of the law of limitation recognize as reasons for extending the period of limitation. That under such circumstances the intention of the Legislature had been substantially complied with, so as to entitle the party affected by the limitation of time to the discretionary indulgence of the Court, is a proposition naturally justifiable by the rules of interpreting statutes, for it neither defeats the object of the limitation of time, nor is it productive of any injustice, hardship, or inconvenience. And I cannot help thinking that in placing such interpretation on s. 602 of the Code, the scope and objects of the section, the nature of the act to which the limitation of time refers, the absence of restricting words regarding the powers of the Court, are circumstances which could not have been ignored. And I cannot help thinking that, bearing these considerations in mind, there is scarcely anything in common between s. 602 and s. 53 of the Code. My answer, then, to the first question formulated by myself is that there is nothing in the language of s. 53 to lead us to the conclusion that the limitation of time to the first hearing was intended by the Legislature to be subject to extension or variation at the discretion of the Court. And I shall presently endeavour to show that every other consideration supports the conclusion that the limitation of time is intended to be imper-

(1) I. L. R., 10 Calc. 557; L. R., 11 Ind. Ap. 7.

ative. This leads me to the other two points enunciated by me at the outset.

The general scope of the section, as the words of the statute clearly show, is to confer a power upon the Court, which power it would otherwise not possess, and to lay down rules for guiding and restricting the exercise of that power, by indicating the conditions under which it may be exercised. Those conditions consist of two distinct elements: one relating to the time or the occasion when the power is to be exercised, the other relating to the cases to which that power is applicable. The former is expressed in the phrase "at or before the first hearing," the latter are enumerated in the various clauses which form an essential part of the section, and the whole section is rendered subject to the limitations contained in the proviso, the last part of the section being unimportant for the present discussion. Such, then, is the general scope of the section. Its primary object, in common with other rules of adjective law, is to secure, as far as practicable, uniformity of procedure to be adopted by the Courts. Further, the object is to enable the correction of technical errors in the plaint at the earliest possible stage, and to prevent the prolongation of a litigation which, by reason of some intrinsic defect, must, if that defect is not cured, finally end in the dismissal of the suit, or introduce an element of confusion. Such, then, in my opinion, are the general scope and objects of the provisions contained in s. 53 of the Code.

As to the *nature* of the power conferred upon the Court by s. 53, I need not say much, for it seems to me obvious that the power of rejecting plaints under that section is essentially a discretionary power, exercisable summarily by the Court *suo motu* in regard to matters which, as the clause of the section shows, are such as can be fully considered and decided by reading the plaint itself. Therefore the nature of the power certainly does not require that the time for its exercise should be extended to a later stage of the trial than the first hearing of the suit. And it seems to be an essential element of the nature of such a discretionary power that it should be exercised promptly and on the earliest possible occasion. For, if the power be held to be exercisable at any time, we have to face the contingency that a plaint may be rejected for

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some one or other of the reasons mentioned in the various clauses of the section at a stage when the entire evidence in the case has been taken, when the final argument of the parties has been heard, and nothing more remains to be done by the Court than decreeing or dismissing the suit.

I have dwelt so much upon the general scope, objects, and nature of the section, because, regardless of these considerations, neither the word "*may*," nor the word "*shall*," nor the fixation of time, nor the absence of prohibitive words, can in themselves furnish an unerring guide to the interpretation of a statutory provision like the one now under consideration. If such were not the rule of construction, almost every other section of the Penal Code, many sections in the Evidence Act, and in other statutes wherein the word "*may*" occurs without being followed by negative words, would be obviously misunderstood. To illustrate what I mean, I take s. 379 of the Penal Code which, in providing punishment for theft, lays down "imprisonment of either description for a term which *may* extend to three years," &c. Now, in this section the word "*may*" occurs, and the limit of punishment is described without any negative words to indicate that the punishment shall not be more than what is provided. I take it that the limitation contained in that section is undoubtedly a restriction upon the power of the Court, and that, notwithstanding the absence of express prohibition, such limitation cannot be disregarded or exceeded. I now take one section from the Evidence Act. S. 61 of that Act provides that "the contents of documents *may* be proved either by primary or by secondary evidence." Here again is the word "*may*" used without being followed by any prohibitive words importing the meaning of the phrase "but not otherwise." Yet the section can hardly be understood to mean that the contents of documents can be proved by a third kind of evidence which is neither primary nor secondary.

After what the learned Chief Justice has said, I need say no more as to the conclusions derivable from the comparison of the language of ss. 29 and 32 of the Code of 1859 with that of s. 53 of the Code of 1877, reproduced in the present Code. But I wish to add that Mr. Broughton, in his note to s. 53 of the Code of 1877, has interpreted the introduction of the phrase "at or before the first

hearing" to be mandatory and restrictive of the discretion of the Court. The learned Chief Justice has also pointed out the uncertainty of practice, inconvenience to parties, delay in the disposal of litigation, which would result from any such interpretation as would leave the Court in possession of a discretionary power of rejecting plaints summarily exercisable at any stage of the suit without any definite restriction, or subject to a restriction such as would practically be no restriction at all. Such could hardly have been the intention of the Legislature in framing s. 53 of the Civil Procedure Code. No doubt, Westropp, C. J., in *Modhe* v. *Dongre* (1) expressed views opposed to the opinion which I have formed in this case, and my brother Oldfield has adopted the ruling. In regard to that ruling, however, it is hardly necessary for me to say more than has already been said here by the learned Chief Justice; but with due deference to my brother Oldfield's views on the subject, and with all the profound respect which I have always felt for any exposition of the law by Sir Michael Westropp, I must confess that the reasons upon which his ruling proceed do not convince me that the interpretation which I have placed on s. 53 would render that section inconsistent with any other part of the Code. There seems scarcely more reason for holding that, if the limitation as to the first hearing contained in s. 53 be understood in the imperative sense, cl. (*f*) of that section would become inconsistent with the second paragraph of s. 32, than there would be for saying that the provisions of s. 110 are inconsistent with the provisos to s. 112. My own view is, that the powers of the Court under the second paragraph of s. 32, as under s. 112, are intended to be applicable to special cases, and that the very fact that such extensive powers are given to the Court in those cases tends to show that the omission in regard to the powers conferred by s. 53 was intended to limit the exercise of the discretionary power, thereby conferred, to the first hearing. But out of respect for the *dicta* of Westropp, C. J., I must explain the difficulties I have in accepting his view. The most important part of the *ratio decidendi* whereon his judgment proceeds is that by understanding the limitation of time of s. 53 as imperative, "we should bring cl. (*f*) of s. 53 into direct conflict with the second

(1) I. L. R., 5 Bom. 609.

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passage of s. 32." Now, if this is so, the argument is undoubtedly strong in favour of placing a permissive meaning on s. 53. But I cannot help feeling that this is not so. Under s. 32, there are two distinct powers given to the Court. The *first* is the power of *striking out* the name of a party "improperly joined" in the suit. The *second* power contained in the second paragraph of the section relates to the transposition and the *addition* of parties. Now the exercise of the first power is limited to the first hearing, the second power is not so limited, and so far I concur with Westropp, C. J. But this is so because the law says so; and I confess that I fail to see how this interpretation brings s. 32 in conflict with s. 53, if an imperative meaning is placed upon the limitation of time contained in the latter section. For I am unable to hold that the summary *return* of the plaint for amendment, or its *rejection* for reasons mentioned in cl. (*f*) of s. 53, are matters synonymous or convertible with the action of the Court under the second paragraph of s. 32, which relates to the *addition* of parties, and says nothing as to the summary *rejection* of the plaint or its *return* for amendment. The power of a party to amend the plaint after it has been once returned to him under s. 53 is practically unrestricted, and restricted only by the terms of the proviso to that section. On the other hand, the *addition* of parties under the second paragraph of s. 32 is limited to persons whose presence the Court that has to decide the suit considers necessary "to adjudicate upon and settle all the questions involved in the suit." Nor indeed can there be amendment of the plaint in the same extensive sense as under s. 53; for the amendment contemplated in consequence of the action of the Court under the second paragraph of s. 32 must be limited to such matters as are necessary to show the connection which the new party has with reference to the scope of the suit. Under s. 53 the plaint may be either *returned* for amendment or *rejected* altogether; under s. 32 neither of these can happen, and it seems to me that the powers exercisable under the two sections are of distinct characters, which can hardly be called consistent or inconsistent with each other. The second paragraph of s. 32 enables the Court to transpose parties and to cure defects in the frame of a suit, so far as the nonjoinder of parties is concerned,—defects which, if they had become apparent at the first hearing, might have led to the

rejection of the plaint, or to its being returned for amendment under s. 53. But if the plaint is not so *rejected* or *returned* at the first hearing, then, the Court having no longer the power either to *return* or *reject* the plaint, the provisions of ss. 32 and 33 are still available. So that, according to my view, the provisions of s. 53, as I understand them, are not inconsistent with the terms of s 32, which deal neither with *rejecting* plaints nor *returning* them —a circumstance which tends to show that the exercise of the discretionary power conferred by the former section is limited to the first hearing of the suit. If this were not so, the greater portion of s. 32 would be superfluous, for s. 53 itself would meet the contingencies for which s. 32 provides. I repeat that I cannot ignore the fact that under s. 32, whatever order the Court may pass to cure defects arising from nonjoinder of parties, it is not at liberty either to *return* the plaint or to *reject* it. In the one case the plaintiff is put out of Court *pro tem*, in the other case the Court orders that to be done which he might himself have done if he had been properly advised. That there is a distinction between the action of the Court under s 53 and that under s. 32 is recognized by the Code itself, for orders rejecting the plaint are appealable as decrees within the meaning of s. 2, and orders returning plaints for amendment are appealable under a cl. (6) of s. 588, different to the cl. (2) under which orders passed under s. 32 are appealable. The nature of the action of the Court under the two sections is thus distinguishable, and, in this view of the law, there is no conflict between cl. (*f*) of s. 53 and the second paragraph of s. 32. Nor does the difficulty contemplated by Westropp, C. J, arise with reference to s. 34 of the Code. It may be that that section "limits in point of time the right of the defendant to object for want of parties, but it does not limit the right of the plaintiff to add parties." But this view does not clash with the interpretation which I have placed upon s. 53; for, if the exigencies of a case require the addition of a party as defendant after the first hearing of the suit is over, s. 32 meets the case. The name of the new defendant could be added under the conditions which s. 32 provides, and the Court would direct the necessary amendment of the plaint under s. 33.

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Indeed, it seems to me that the tendency of the other provisions of the Code points to conclusions in favour of the view which I have taken. S. 31 lays down that "no suit shall be defeated by reason of the misjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." This is a general and imperative rule, and the next section (32), whilst confining to the *first hearing* the power of the Court to *strike out* parties from the plaint, gives the Court power to *add* parties whose presence it deems necessary "to adjudicate upon and settle all the questions involved in the suit." Then follows s. 33, which gives liberty to the Court to amend the plaint when the action under s. 32 renders such amendment necessary. The next section (34) imperatively lays down the rule that objections as to nonjoinder or misjoinder of parties "shall be taken at the earliest possible opportunity, *and in all cases before the first hearing.* Leaving the intermediate sections alone, Chap. IV deals with the frame of the suit, and in that chapter occurs s. 45, which gives discretionary power to the Court to order separate trials of the causes of action included in one suit. The power so conferred is clearly limited to "*any time before the first hearing,*" unless "the parties agree" that the same may be done "at any subsequent stage of the suit." In keeping with these provisions is s. 46, which enables the defendant to apply "*at any time before the first hearing*, or, where issues are settled, before any evidence is recorded" to confine "the suit to such causes of action as may be conveniently disposed of in one suit." Here again the limitation as to time is clearly imperative, though the negative words are absent. Then comes s. 47, which allows such amendment as may be necessitated by adoption of the procedure provided by the immediately preceding section. The law having so far laid down that, as far as possible, technical difficulties as to the plaint must be dealt with at the earliest possible stage of the suit, confers a distinct power, in s. 53, which is not conferred by any preceding section. If I may use the expression, the really important "catch words" of the power are "*reject*" and "*return*"—words which are not to be found in s. 32 or any other sections to which I have referred. And though the word "*amend*" also occurs in

s. 53, it must, by reason of the context, be necessarily taken to refer to the amendments arising from any of the causes described in the section, and not from causes already provided for. Again, so far as the word "*amend*" is concerned, the adverbial phrase "*then and there*" necessarily limits the power to the first hearing, that is, amendments for any of the *particular* causes mentioned in the section must be made at *that* stage. This corroborates my view, for I fail to see how "*then and there*" can be taken to refer to any stage of the suit other than that mentioned in the section. At least such is my interpretation of a phrase which is not a phrase of the language that is my own. But, as I said before, the main difficulty relates to the words "*return*" and "*reject.*" In this case we are concerned only indirectly with the power of the Court to *return* the plaint for amendment, and we are directly concerned with the power of the Court to *reject* the plaint for any of the reasons described in s. 53. So far as the ruling of Westropp, C. J., is concerned, I may say that if the *ratio decidendi* of his judgment had been limited to the simple proposition that the plaint may, under certain circumstances, be amended by the Court after the first hearing, (*e. g.*, cases contemplated by ss. 32, 33, and 47), for causes other than those described in s. 53, I should not necessarily have regarded that ruling as an authority against the view which I have taken on the particular point we are called upon to determine in this case. But upon the exact point directly before us, I hold that the limitation of time contained in the phrase "at or before the first hearing," as it occurs in s. 53 of the Code, was intended by the Legislature to be imperative, so as to prohibit the exercise, after the specified period, of the power conferred by the section regarding the rejection of plaints. What I have said does not, of course, apply to rejection of plaints under s. 54, wherein no words importing a limitation of time occur—a circumstance which again favours the conclusion at which I have arrived. And I wish to add that, because the question is not now before us, nothing that I have said here must be taken to lay down any rule, one way or the other, respecting the powers of the appellate Court in such matters.

My answer to the question now before us is in the negative.

P.C.
J.C.
1884.

PRIVY COUNCIL.

BENI RAM AND ANOTHER (DECREE-HOLDERS) *v.* NANHU MAL (JUDGMENT-DEBTOR).

[On Appeal from the High Court for the North-Western Provinces.]

Execution of decree—Finality of order made in execution-proceedings construing decree.

In reference to an application for execution of a decree, a Court made an order between the parties, construing the decree to award interest at a certain rate till payment.

Held that no contrary construction could be placed upon the decree in a subsequent application in the execution proceedings.

Ram Kirpal v. *Rup Kuari* (1) referred to and followed.

APPEAL from a decree (10th January, 1881) of the High Court reversing a decree (18th August, 1880) of the Subordinate Judge of Aligarh.

This appeal arose out of a dispute as to the true construction of a decree for money and interest, made by the Subordinate Judge of Aligarh on 7th May, 1875, which contained the terms of a compromise come to by the father of the present appellants, on the one hand, and the father of the respondent, on the other. The decree was for Rs. 78,700, as due up to 4th May, 1875, to be paid by the defendant in two years, with interest at twelve annas per cent. per mensem.

The question as to the period during which the decree-holder was to get interest at the rate mentioned in the decree had been, previously to the filing of the petition out of which this appeal arose, raised between the parties in the petitions stated in their Lordships' judgment.

On an objection filed by the judgment-debtor on the 30th August, 1878, the Subordinate Judge of Aligarh made an order, on the 25th January, 1879, against which no appeal was preferred, declaring that interest was payable at twelve annas per cent per mensem to the date of payment; and the main question on this appeal was whether the order of 25th January, 1879, had not become final between the parties.

Present: LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) I. L. R., 6 All. 269; L. R., 11 Ind. Ap. 37.

On a petition for execution, filed by the decree-holder on the 5th December, 1879, the Subordinate Judge stated in his order that, on a proper construction of the decree, interest at twelve annas per cent. per mensem was payable until realization; and that this point had been definitely settled by the Court on the 25th January, 1879.

The judgment-debtor having appealed to the High Court, a Divisional Bench (STRAIGHT and OLDFIELD, JJ.) reversed the decision of the Subordinate Judge, and remanded the proceedings.

The material part of the judgment of the High Court was stated by their Lordships in giving their opinion.

On this appeal,

Mr. *J. G. Whitehorne*, Q. C., and Mr. *W. A. Raikes* appeared for the appellants.

Mr. *J. F. Popham*, for the respondent.

For the appellant it was contended that the question as to the rate of interest and the period for which it was payable, under the decree of May, 1875, had been previously determined by a competent Court making an order in execution of the same decree; and, no appeal having been preferred against the order so made on 25th January, 1879, it was conclusive between the parties. Reference was made to *Pearetb* v. *Marriott* (1), and *Ram Kirpal* v. *Rup Kuari* (2).

For the respondent it was argued that the terms of the order of 25th January, 1879, were not conclusive; and it was pointed out that the decision of the High Court in this case followed on the Full Bench ruling that had been given in *Ram Kirpal* v. *Rup Kuari* (2).

At the conclusion of the arguments on behalf of the parties, their Lordships' judgment was delivered by

SIR R. COUCH.—The question in this appeal arises in the execution of a decree of the Court of the Subordinate Judge of Aligarh, dated the 7th May, 1875. It was on a compromise, the claim in

(1) L. R., 22 Ch. D. 182. (2) I. L. R., 6 All. 269; L. R., 11 Ind. Ap. 37.

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the suit being to recover Rs. 60,000, principal, and Rs. 14,715, fixed sum of Rs. 78,700, as due up to the 4th May, 1875, be given to the plaintiff against the two defendants under the terms of the compromise; that this sum be paid by the defendants in two years, with interest at 12 annas per cent. per mensem." The claim was upon a bond of the 10th July, 1872, which stipulated for interest at 12 annas per cent. Execution-proceedings appear to have been taken upon this decree, but the actual application for the execution is not on the record. It would appear, however, that some villages were sold on the 20th December, 1877, and were purchased by the decree-holder; and a petition was presented by the judgment-debtors on the 20th April, 1878, in which it was said that they were willing to pay interest according to accounts.

On the 17th May, 1878, they presented another petition, in which the statement was made that the decree-holder should not get the interest which he then claimed, the question apparently being as to the interest beyond the two years. On the 30th August, 1878, the question between the parties was more distinctly raised. Then, in a petition of the judgment-debtors, it was stated that the plaintiff had filed an application for execution of the decree in the sum of Rs. 38,000 on the 6th August, 1878, "and charged interest at 12 annas per cent. after the lapse of the term of two years, contrary to the terms of the decree. Prior to this, on 18th July, 1878, an objection was filed regarding the same, which was rejected without due consideration. The petitioner therefore prays that an order, after inquiry, may be passed for de ducting the excessive interest which the decree-holder has charged contrary to the terms of the decree." On this it was ordered that the case should be brought forward for decision on the 1st November, 1878. It appears from the list of papers that have not been forwarded with the record that the case was twice adjourned, and on the 25th January, 1879, an order was made in these terms:—"In my opinion the objection is not tenable. The decree of the Court of the Subordinate Judge, dated 7th May, 1875, clearly provides that under the terms of the compromise a decree for the payment of a fixed sum of Rs. 78,800 be made in favour of the plaintiff against both the defendants as due up to the 4th May, 1875, and that defendants should pay the amount with interest at 12 annas per cent. per

interest. The decree was in these terms: "That a decree for a mensem. Hence the plea of the defendants cannot in any way be held to be a reasonable one." Then it states what the plea of the defendant was:—"That if the said amount had been paid within two years the interest would have been paid to the decree-holder, and that the interest on the decree-money could not be recovered after the expiry of the term fixed for payment." Looking at the dates which have been given, it seems clear that this order must have been made in the execution-proceedings in which the petition of the 30th August, 1878, had been presented. It is an order by the Judge deciding against the objection which had been made by the judgment-debtor, that the decree-money could not be recovered after the expiry of the two years. The next step appears to have been an application for the execution of this decree on the 5th December, 1879, in which an account was made up claiming the interest at the rate of the 12 per cent. up to the time of the execution; and upon that the Judge made this order. As to the first objection,—which was this: "The judgment-debtor has the following objections to the whole of the demand made under the decree: (1) From the date of the decree the decree-holder cannot, under any circumstances, get more than eight annas per cent. interest on the decree-money according to law, especially when the decree does not provide for any interest after two years, nor has any rate been fixed in it,"—the Judge says: "The Court is of opinion that the decree-holder should get the same interest on the decretal money which has been awarded to him in the Court's decision in the regular suit. It is 12 annas per cent. In the execution department the Court cannot, contrary to the decision in the regular suit, reduce the rate of interest from 12 annas per cent. to 8 annas per cent. in any way. The objector's statement, that the decree does not provide any rate of interest subsequent to two years, is altogether wrong. The two years' period in the decree is for the payment of the judgment-debt, not for the payment of interest at 12 annas per cent". Then comes this: "Before this also this very objection had been raised on behalf of the objector, and rejected by the Court on the 25th January, 1879. No appeal has been preferred from that order." From that decision there was an appeal to the High Court, which says in its judgment: "It

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was urged before us that the decree-holder is not entitled to any interest after the expiry of two years from the date of the decree; and this seems to us to be the case. The decree is for a sum of Rs. 78,700 only. The decretal order proceeds to direct that this sum shall be paid in two years, with interest at 12 annas per cent. per mensem, but there is no order as to payment of interest after two years." The High Court took no notice of the ground upon which the Subordinate Judge decided,—that the question had been concluded by his order of the 25th January, 1879, and their Lordships think it should be remarked, in justice to the High Court, that this may be accounted for by the fact that not long before this the Full Bench of that Court had held that the law, which they call the law of *res judicata*, was not applicable to execution proceedings. The question now for their Lordships' decision is, whether the order of the 25th January, 1879, was not conclusive between these parties? It was an order made in the execution proceedings in this very suit; and the decision of this Board in *Ram Kirpal* v. *Rup Kuari* (1) is exactly in point. The only question that could be raised, and was raised by the learned counsel for the respondent, was that there might be some difficulty as to the construction to be put upon the words of the order of the 25th of January, 1879. But looking at the terms of that order, although it may not be so clearly expressed as it might have been, there appears to be no doubt that what was decided on that occasion was the same right to recover the interest, after the expiration of the two years which was fixed by the decree for payment, as is now put in question in the present execution-proceedings.

Under these circumstances their Lordships will humbly advise Her Majesty that the order of the High Court be reversed; and the respondent will pay the costs of this appeal, and also pay the costs of the proceedings in the High Court.

Solicitors for the appellants: Messrs. *Oehme* and *Summerhays*.

Solicitors for the respondent: Messrs. *Wilkinson* and *Son*.

(1) I. L. R., 6 All. 269; L. R. 11 Ind. Ap. 37.

APPELLATE CIVIL.

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August 7.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

RAM SAHAI (JUDGMENT-DEBTOR) *v.* GAYA AND OTHERS (DECREE-HOLDERS).*

Pre-emption—Conditional decree—"Finality" of decree—Holiday—Act XV of 1877 (Limitation Act), s. 5, sch. ii, No. 156—Execution of decree—Sale of property by decree-holder before obtaining possession—Decree-holder's right not forfeited.

A decree in a suit to enforce a right of pre-emption directed that the purchase-money should be paid within a certain period from the date the decree became "final". The period of limitation prescribed for an appeal from this decree expired on a day when the Court was closed. *Held* that the decree did not become "final" before the day the Court re-opened. *Shaikh Ewaz* v. *Mokuna Bibi* (1) followed.

The holder of a decree enforcing a right of pre-emption, who subsequently to the date of the decree sells the property to a "stranger" and permits the latter to pay the purchase-money decreed into court, does not by such conduct debar himself from obtaining possession of the property in execution of the decree.

Rajjo v. *Lalman* (2) and *Sarju Prasad* v. *Jamna Prasad* (3) distinguished.

THE respondents in this case obtained a decree for pre-emption on the 30th June, 1883, under the terms of which the purchase-money was to be paid into court within two months from the date of the decree becoming "final." This decree was appealable to the High Court, but before the expiry of the period of limitation prescribed by law for the appeal, the High Court was closed on account of the long vacation and did not re-open till the 19th November, 1883, when no appeal was preferred. On the 29th November, 1883, the respondents executed a sale-deed conveying the property (to which the decree of the 30th June, 1883, related) to one Ambika Prasad. On the same day, the respondents filed an application for execution of the decree, and, after reciting that they had sold the property included in the decree to Ambika Prasad, prayed that the latter might be allowed to deposit the purchase-money, and that they (the decree-holders) might be placed in possession, in order that they might make over possession of the property to the new vendee. The Court below accepted the deposit, and allowed execution of the decree in the manner prayed.

* First Appeal No. 36 of 1884, from an order of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 21st January, 1884.

(1) I. L. R., 1 All. 132. (2) I. L. R. 5 All. 180.
(3) S. A. from Order No. 45 of 1883, decided the 21st November 1883, not reported.

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On appeal, the judgment-debtor raised the same objections which had been urged unsuccessfully in the lower Court. In the first place, it was contended that the deposit of the purchase-money, with the application of the 29th November, 1883, was not made within the time allowed by the decree, which must therefore be taken to have become incapable of execution at the instance of the pre-emptor, under the provisions of s. 214 of the Civil Procedure Code. In the second place, it was contended that the action of the respondents in executing the sale-deed of the 29th November, before having obtained possession under the decree, invalidated their pre-emptive right, rendering the decree incapable of enforcement. In support of this contention, the appellant relied upon *Rajjo* v. *Lalman* (1).

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

Mr. *T. Conlan* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

MAHMOOD, J.—(After stating the facts, continued) :—We have no hesitation in holding that the first part of the argument addressed to us on behalf of the appellant is unsound. Reading s. 5 with art. 156, sch. ii. of the Limitation Act (XV of 1877), there can be no doubt that the period of limitation for preferring an appeal from the decree of the 30th June, 1883, did not expire till the 19th November, 1883, when this Court re-opened, and the decree cannot before be regarded as having become final before that date. The point before us is governed by the principle laid down by this Court in *Shaikh Ewaz* v. *Mokuna Bibi* (2), and following that ruling, we disallow the two first grounds of appeal.

The second question, however, which forms the subject of the remaining grounds of appeal, is a point of some nicety. In the case of *Rajjo* v. *Lalman* (1) this Court laid down the principle that when a pre-emptor, in anticipation of the success of his pre-emptive claim, transfers the pre-emptional property in any manner inconsistent with the object of the suit for pre-emption, such transfer operates as forfeiture of the pre-emptive right, and the suit for

(1) I. L. R., 5 All. 180. (2) I. L. R., 1 All. 132.

pre-emption must, therefore, be dismissed. Again, in the unreported case of *Sarju Prasad* v. *Jamna Prasad* (1) Straight and Tyrrell, JJ., laid down the rule that a decree for pre-emption, being purely personal in its character, could not be transferred so as to entitle the purchaser to execute the decree. The learned pleaders for the appellant contend that the principles laid down in these two rulings govern the present case, because the action of the pre-emptor-decree-holder, in transferring the pre-emptional property (included in the decree), by executing the sale-deed of the 29th November, 1883, virtually amounted to transfer of the decree itself, and should therefore operate in defeasance of the pre-emptor-decree-holder's right to execute the decree.

We are of opinion that this contention, though plausible, has no real force. In the case of *Rajjo* v. *Lalman* (2) the transfer had been made by the plaintiff-pre-emptor before his suit was decreed, and in the case of *Sarju Prasad* v. *Jamna Prasad* (1) the person who was seeking to execute the decree was not the pre-emptor-decree-holder, but the person to whom the decree had been transferred. We agree with the rules laid down in both these cases; but they are distinguishable in principle from the case now before us. In the former of these cases, the question was whether the plaintiff-pre-emptor, who had himself infringed the right of pre-emption in connection with the property in suit, should be allowed to obtain a decree for pre-emption; and the effect of the latter ruling was to uphold the principle, that no decree of Court passed in a suit for pre-emption can be so transferred as to invest the transferee with the right of obtaining possession of the pre-emptional property by executing that decree. The case now before us is one in which the pre-emptor's right of pre-emption had already been established by a decree which had become final before the sale-deed of the 29th November, 1883, was executed. That sale-deed did not transfer the *decree*, but the *property*, to the proprietary possession of which the pre-emptor-decree-holder was entitled, subject only to the payment of the purchase-money within time. It is not necessary for the purposes of this appeal to determine whether the sale-deed was valid. The question is one which, if it ever arises,

(1) S.A. from Order No. 45 of 1883, decided the 21st November, 1883.
(2) I. L. R., 5 All. 180.

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can be finally determined only in a suit between the pre-emptor-decree-holder and his vendee, Ambika Prasad. So long as the latter does not seek execution of the decree, the matter cannot be regarded as a question relating to the execution of the decree, such as would fall under the purview of s. 244 of the Civil Procedure Code. The parties to the decree are bound by the terms of the decree itself, and the Court executing the decree has no power to go behind it, to declare it annulled, or to enter into any questions which are beyond the scope of the decree. The rules of procedure, therefore, precluded the Court below from entertaining the objections of the judgment-debtor-appellant so far as they were based upon the sale-deed executed by the pre-emptor-decree-holder, who, in praying for execution of the d cree, was obeying its terms. Nor can the decree be regarded as annulled by reason of the fact that the money was deposited on behalf of the pre-emptor-decree-holder by Ambika Prasad under the terms of the decree. All that the appellant was entitled to was the right of receiving the purchase-money before delivering possession of the pre-emptional property to the decree-holder. That decree-holder, and not Ambika Prasad, is the person who, in the proceedings from which this appeal has arisen, is seeking to obtain possession of the property, and it is of no consequence that the purchase-money was deposited by the latter on behalf of the former. For it is clear that the pre-emptor-decree-holder, and not Ambika Prasad, is the person to whom possession must be delivered in execution of the decree, and that if Ambika Prasad has any valid rights under the sale-deed, he can enforce them only by a separate suit.

This last circumstance distinguishes the present case in principle from the ruling in the case of *Sarju Prasad* v. *Jamna Prasad* (1). If in the present case Ambika Prasad were the transferee of the pre-emptive decree, seeking by virtue of that decree to obtain possession of the pre-emptional property, we should have disallowed his application for execution. But such is not the case, and the authority referred to does not therefore govern this case.

The distinction which we have thus drawn is not merely technical, but is based on fundamental principles of the law of pre-emption.

(1) Not reported; S. A. from Order No. 45 of 1883, decided the 21st November, 1883.

The sole object of the right of pre-emption is the exclusion of such strangers as are objectionable to the pre-emptive co-sharers of the vendor. And if a decree for pre-emption were capable of transfer, so as to enable the transferee to obtain possession of the pre-emptional property in execution of that decree, it is clear that the object of the right of pre-emption would be defeated, for the transferee of the decree may be as much a stranger as the vendee against whom the decree was obtained, or that the latter may be a pre-emptor of a lower grade than the pre-emptor who originally obtained the decree.

A decree once passed cannot, as we have already said, be questioned by any of the parties thereto when the decree is being executed, and if a decree for pre-emption could be validly transferred, the effect would be to place the transferee in possession without the trial of the question whether such transferee had the pre-emptive right in preference to the vendee against whom the decree was obtained. Nor could the sale of a pre-emptive decree be regarded as giving rise to a fresh cause of action for a separate suit to enforce pre-emption, and it follows that, not only the rights of the vendee-judgment-debtor, but also those of other co-sharers, might be injured by allowing the transferee of a pre-emptive decree to take out execution. On the other hand, in a case like the present, where the pre-emptional *property* and not the *decree* has been transferred, the effect of executing the decree can only be to place the pre-emptor-decree-holder in possession of the pre-emptional property, and the sale-deed executed by him, if valid, would give rise to a separate cause of action for a pre-emptive suit to be instituted by any person or persons who may consider the sale as having infringed their pre-emptive right. In the present case, whether the sale-deed of the 29th November, 1883, be valid or invalid, it must necessarily remain in abeyance till the pre-emptor-decree-holder obtains possession of the pre-emptional property under the decree; and, under this view, the present case is analogous to one in which the pre-emptor-decree-holder, immediately after obtaining possession under the decree, sells the property.

For these reasons, and without prejudice to any rights that may arise out of the sale-deed of the 29th November, 1883, we hold

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that the Court below was right in allowing the execution of the decree at the instance of the plaintiff-pre-emptor, and we dismiss this appeal with costs.

Appeal dismissed.

1884 *August* 11.

Before Mr. Justice Oldfield and Mr. Justice Duthoit.

THE MAHARAJA OF BENARES (PLAINTIFF) *v.* ANGAN (DEFENDANT).*

Jurisdiction—Act XII of 1881 (*N-W. P Rent Act*), *ss.* 10, 95 (*a*)—*Suit by landlord to determine nature of tenant's tenure.*

The cognizance of the Civil Courts of a suit by a landholder for a declaration that a tenant is not a tenant at fixed rates, or an occupancy-tenant, but a tenant-at-will, is barred by the provisions of s. 95 (*a*) of the N.-W. P. Rent Act 1881.

THE plaintiff, the Maharaja of Benares, let certain land to the defendant, for purposes of cultivation. Subsequently desiring to eject the defendant from his holding, the plaintiff's lessee caused a written notice of ejectment to be served on him under s. 38 of the N.-W. P. Rent Act (XII of 1881). The defendant objected that he was a tenant having a right of occupancy, and eventually this objection was allowed by the Board of Revenue, and the notice of ejectment set aside.

The plaintiff then brought the present suit for possession of the land, and for a declaration that the defendant had no right thereto. The lower Courts (Munsif and District Judge of Benares) concurred in dismissing the claim, on the ground that, as the plaintiff admitted the defendant's tenancy, the sole question in the suit was as to the nature and class of the tenure, and that such a question was, by the provisions of s. 95 of the Rent Act, excluded from the cognizance of the Civil Court. The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Sital Prasad*, for the appellant.

Lala *Lalta Prasad*, for the respondent.

The Court (OLDFIELD and DUTHOIT, JJ) delivered the following judgment:—

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* Second Appeal No 257 of 1884, from a decree of D M Gardner, Esq, District Judge of Benares dated the 24th November, 1883, affirming a decree of Shah Ahmad-ullah, Munsif of Benares, dated the 2nd July, 1883.

OLDFIELD, J.—The only question raised in appeal is whether the suit is cognizable by the Civil Court, and we are clearly of opinion that the Courts below have rightly held that it is not.

The plaintiff admits that the defendant is his tenant, but asserts that he is a tenant-at-will, and he seeks to have it declared that the defendant is neither a tenant at fixed rates nor a tenant with rights of occupancy, but a tenant-at-will, and he further seeks to eject him.

The pleader for the appellant is unable to support the plea that a suit on the part of the plaintiff to eject the defendant will lie in the Civil Court. Such a suit is clearly barred by the provisions of s. 95 of the Rent Act, the remedy being by application to eject under s. 35, or to have notice of ejectment served under s. 38. Suits for ejectment have only been allowed in a Civil Court in cases in which the plaintiff has denied that the relation of landlord and tenant has existed, and in which the Court has been asked to decide the question of title between the parties; and in such cases, when the defendant was found to be the tenant of the plaintiff, the latter has been left to seek his remedy for ejectment in the Revenue Court.

But it has been contended that the Civil Court may determine the nature and class of a tenant's tenure in a suit brought by the landlord, notwithstanding anything contained in s. 95 of the Rent Act, and the ground for this contention is that, although a tenant can make an application in a Revenue Court for determination of the nature and class of his tenure, there is no provision enabling a landlord to do so, and he would therefore be without remedy.

To this, however, it might be replied that where there is a dispute as to the nature and class of a tenant's tenure, the landlord can always bring the question to trial in a Revenue Court, by enforcing against the tenant his asserted rights as landlord.

But, however this may be, the terms of s. 95 (*a*) are clear, and do not allow of the Civil Court's jurisdiction in such matters. Revenue Courts alone have cognizance of any dispute or matter in which an application to determine the nature and class of a tenant's tenure under s. 10 might be made. The dispute or matter here is as to the nature and class of the defendant's tenure as

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a tenant, and is one on which the latter might make an application under s. 10. It does not affect the question that the plaintiff as landlord may not be able to make an application under s. 10, for the dispute or matter is none the less one contemplated by s. 95, which deals with the character of the dispute between the parties suing, and has for its object to leave to the Revenue Courts the determination of all disputes between landlord and tenant as to the nature and class of the tenant's tenure.

Were it otherwise, we should have applications made by a tenant in the Revenue Court under s. 10 and decided by that Court, and the same questions re-opened on the part of the landlord in the Civil Court. In the present case, indeed, we find that the plaintiff's lessee put into force against the defendant, in the Revenue Court, the provisions of s. 36 of the Rent Act, but without success, and that the defendant has obtained a decision from the Revenue Court in respect of the nature and class of his tenure.

The appeal is dismissed with costs.

Appeal dismissed.

1884 *August* 15.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

RAM PIYARI (DEFENDANT) *v.* MULCHAND (PLAINTIFF).

Hindu Law—Mitakshara—Hindu widow—Estate inherited by two Hindu widows from deceased husband—Alienation by one widow.

When their Lordships of the Privy Council have seen fit to place a definite construction upon any point of Hindu Law, the High Court is bound by such construction until such time as their Lordships may think fit to vary the same.

According to the Mitakshara Law, the estate which two Hindu widows take by inheritance from their deceased husband is not several, but joint. The senior of two such Hindu widows is not a manager of such estate, and competent, for purposes of legal necessity, to alienate it, without the consent of the other. *Bhugwandeen Doobey* v. *Myna Baee* (1) and *Gajapathi Nilamani* v. *Gajapathi Radhamini* (2) referred to.

THE facts of this case and of S. A. No. 1756 (cross-appeals) are sufficiently stated for the purposes of this report, in the judgment of Duthoit, J.

Mr. *A. H. S. Reid* and Shah *Asad Ali*, for the appellant.

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* Second Appeal No. 1709 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Mainpuri, dated the 12th September, 1883 modifying a decree of Shaikh Sakhawat Ali, Munsif of Etah, dated the 9th July, 1883.

(1) 11 Moo. I. A. 487. (2) I. L. R., 1 Mad. 290.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

DUTHOIT, J.—This appeal and appeal No. 1756 are cross-appeals from a single decree of the Subordinate Judge of Mainpuri. They may be conveniently disposed of together.

The facts, so far as our present purpose is concerned, may be thus stated:—Badridayal was the owner of a house in *kasbeh* Patiali. He died in March, 1881, leaving two widows, Chandan Kuar (senior) and Ram Piyari (junior), and a daughter by Chandan Kuar. On the death of Badridayal his estate passed to his widows, between whom there has been no partition. On the 29th November, 1882, Chandan Kuar sold the house in *kasbeh* Patiali to Mulchand for Rs. 2[illegible]0. The house is described in the deed of sale as part of the estate left by Badridayal, and now the sole and exclusive property of the vendor; and the reason for the sale is stated to be the need of money to defray the expenses of the marriage of Badridayal's daughter—a pious duty.

Mulchand did not succeed in obtaining delivery of the property so purchased by him, and he therefore, on the 28th May, 1883, sued his vendor and others for possession of it. He did not implead Musammat Ram Piyari, but she was made a defendant at her own request, and, as the cause now stands, she and Mulchand are the only parties to it.

The lower appellate Court has found that the alleged necessity for the sale did not in fact exist; that each of the widows was entitled to a moiety of the house; that the sale by Musammat Chandan Kuar was to that extent effectual, but that, as regards Musammat Ram Piyari's moiety, the sale was void and of no effect. It has therefore decreed the plaintiff's claim as regards one-half of the house, and has dismissed it as regards the other half.

Both Mulchand and Ram Piyari have appealed.

It is contended on behalf of Musammat Piyari (appeal No. 1709) that the estate of Badridayal's widow was a single joint estate, with an inherent right of survivorship to the surviving widow;

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RAM PIYARI v. MULCHAND.

that, consequently, as Ram Piyari was not a party to the alienation, and in no way consented to it, the deed of sale was void, and of no effect, and could not be effectual even had circumstances of necessity existed, which, however, did not exist, and have been found not to have existed; and that the entire claim of the plaintiff should therefore have been dismissed.

On behalf of Mulchand, plaintiff (appeal No. 1756), it is contended that the entire claim of the plaintiff should have been decreed. The argument of the learned pleader for the defendant is based upon two propositions, *viz.*:—

(*a*) That the law enunciated by their Lordships of the Privy Council as to the nature of the estate which two Hindu widows take by inheritance from their deceased husband, is at variance with the law as stated in the text, and that, upon a true view of the Mitakshara Law, that estate is not joint, but several, and that the house in dispute was the sole property of the vendor Musammat Chandan Kuar.

(*b*) That even supposing the nature of the estate which two Hindu widows take by inheritance from their deceased husband to be joint, yet the senior widow is manager of such estate, and is competent for purposes of legal necessity to alienе it, and that such circumstances did in this case exist.

In support of the former of these positions the learned pleader has cited the *Viramitrodaya*, Chapter III, Part i, ss. 2 and 10 (ed., Calcutta, 1879, pp. 132 and 153); Norton's *Leading Cases* (ed., Madras, 1871, p. 509); the *Tagore Law Lectures*, 1879, p. 304; West and Bühler's *Hindu Law*, 3rd ed., pp. 89 and 651; and two decisions of the Courts—one of the Calcutta High Court,—*Judobunsee Koer* v. *Girblurun Koer* (1)—the other of the Madras High Court,—*H. H. M Jijoyiamba Bayi Saiba* v. *H. H. M. Kamakshi Bayi Saiba* (2).

In support of the latter position he has cited a passage from Mr. Mayne's work on *Hindu Law and Usage* (s. 469, ed. 1878, p. 470), which runs thus:—

"On the same principle of joint tenancy with survivorship, no alienation by one widow can have any validity against the others without their consent, or on established necessity."

(1) 12 W. R. 153. (2) 3 Mad. H. C. Rep. 424.

As regards the former proposition, I observe that, although I cannot deny that it appears to be well founded, yet, I find myself precluded from entertaining it. When their Lordships of the Privy Council have seen fit to place a definite construction upon any point of Hindu Law, this Court is bound by such construction until such time as their Lordships may think fit to vary the same.

As regards the latter proposition, I remark that the only authority which Mr. Mayne has cited in support of the suggestion that, in case of necessity, one of two widows may aliene the property without the consent of the other, is the case of *Bhugwandeen Doobey* v. *Myna Baee* (1) and that, after careful perusal of the judgment of the Lords of the Privy Council in that case, I am unable to find that their Lordships ruled to the effect stated.

In *Bhugwandeen Doobey* v. *Myna Baee* (1) their Lordships stated the law upon the point at issue in the following terms at p. 515 :—

" The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion of daughters of the deceased widow. They are, therefore, in the strictest sense, co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other."

And in *Gajapathi Nilamani* v. *Gajapathi Radhamani* (2) their Lordships remarked :—

"It was held there (*i. e*, in *Bhugwandeen's Case*) that there was no objection to a transaction which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected, although the widows nevertheless remained co-parceners, with a right of survivorship with them, and there could be no alienation by one without the consent of the other . . . . . They think it sufficiently appears in this case (*i. e.*, in the case then before their Lordships) that the state of things contemplated by the *Tanjore Case* exists; that these widows could not go on peaceably in the joint enjoyment of property, and that they have acted as if they had agreed that they

(1) 11 Moo. I. A. 487. (2) I. L. R., 1 Mad., at p. 300.

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are separately to enjoy, in the manner above indicated, their respective shares. Therefore their Lordships, guarding themselves against being supposed to affirm by their order that either widow has power to dispose of one-fourth of the estate allotted to her, or that they have any right to partition in the proper sense of the term, are not disposed to vary the form of the order under which one-fourth of the profits of the estate will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected."

It seems to me that these *dicta* of their Lordships of the Privy Council, both of which are expositions of the Mitakshara Law, negative the contentions of the learned pleader for the plaintiff, and support the contentions of the learned counsel for the defendant Ram Piyari.

I would therefore decree the appeal of the defendant Musammat Ram Piyari, and dismiss the appeal and the suit of the plaintiff with all costs in all the Courts.

MAHMOOD, J.—I concur.

Appeal allowed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

1884 *August* 15.

HARJAS (PLAINTIFF) *v* KANHYA (DEFENDANT) *

Pre-emption—Joint purchase by co-sharers and stranger— Pre-emptor not compelled to pre-empt share purchased by co-sharers.

If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co sharer vendee is concerned.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Nand Lal*, for the appellant.

Munshi *Sundar Lal* and Babu *Ratan Chand*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and BRODHURST, J.) delivered the following judgment:—

STRAIGHT, Offg. C. J.—On the 22nd June, 1882, Musammat Sujano sold a moiety of her zamíndári share in a village, consist-

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* Second Appeal No. 1675 of 1883, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 7th September, 1883, affirming a decree of Lala Baij Nath, Munsif of Meerut, dated the 21st July, 1883.

ing of 17 bighas, 15 biswas, 10 biswansis of land, with all the rights pertaining thereto, to five persons, namely, Umrao, Ram Prasad, Sarjit, Kanhya, and Dalpet, in equal shares, for a consideration, so the sale-deed recites, of Rs. 1,300. The vendees Nos. 1, 2, 3, and 5 are co-sharers, but No. 4 is admittedly a stranger. The plaintiff-appellant's suit, which was instituted on the 15th June, 1883, was brought to establish his right of pre-emption as against Kanhya, in respect of the one-fifth share purchased by him, and to obtain possession thereof upon payment of what might be deemed to be the proportionate price of such fifth. Both the lower Courts dismissed the claim, following, as they considered, a ruling of this Court, in *Manna Singh* v. *Ramadhin Singh* (1). The plaintiff has preferred the special appeal before us, and the grounds taken by him substantially are—first, that the case relied on by the lower Courts is inapposite; and next, that it was competent for him to maintain his suit in the present form. There seems to be no doubt that the plaintiff is a co-sharer; that he has a right of pre-emption over the whole of the property passed by the sale-deed of the 22nd June, 1882, and consequently over the whole of the one-fifth of which Kanhya was the purchaser. In his plaint he has asked for the declaration of his pre-emptive right as to the whole of such one-fifth, and the only question is, whether he can do so. The lower Courts proceeded on the view that he is not entitled to impeach the sale of the 22nd June, 1882, except in its entirety, and they appear to have thought that the converse of the rule laid down by this Court in the case already adverted to was necessarily binding on them. This was an error, probably due to misapprehension of the principle upon which a co-sharer who has associated a stranger with him in the purchase of a share, is not allowed to assert his own pre-emptive right to defeat a suit by another co-sharer who impeaches the sale as a whole. The grounds upon which this rule rests are pointed out by Mahmood, J., in *Bhawani Prasad* v. *Damru* (2). In the present case, the plaintiff-appellant might have attacked the entire sale in respect of all the five vendees, and have treated the four co-sharers as strangers, but there was no obligation on him to do so, for the right of pre-emption which gives a co-sharer the first call, so as to enable him to

(1) I. L. R., 4 All. 252. (2) I. L. R., 5 All. 197.

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exclude a stranger from the co-parcenary, does not compel him to exercise his right, and he may relinquish it if he thinks proper. If, however, he does exercise it, then the obligation rests upon him to do so as to all that the stranger has purchased.

Hence, if a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale so far as the co-sharer-vendee is concerned, for it may well be that he has no desire to exclude such co-sharer. We think that the plaintiff-appellant was entitled to prefer his present claim in respect of the one-fifth purchased by Kanhya, upon payment of his proportion of the purchase-money. In this view of the case, we decree the appeal, and, reversing the decision of the lower appellate Court, remand the case for trial on its merits.

Appeal allowed.

1884 *August* 15.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

MUHAMMAD ZAKI AND OTHERS (DEFENDANTS) *v.* CHATKU (PLAINTIFF).*

Act XV of 1877 (*Limitation Act*), *sch.* ii., *No.* 132—*Suit for money charged upon rents and profits—Suit for money charged upon immoveable property.*

K borrowed from *C* a sum of Rs 571, and at the same time executed a bond whereby he mortgaged usufructuarily to his creditor his "entire right and share" in a particular estate, in lieu of the above-mentioned sum; and it was agreed that *C* might realise the debt from the rents and profits of two years, and that, as soon as it had been realised, his possession should cease.

Held that the money borrowed by *K* was "money charged upon immoveable property", it being charged upon rents and profits *in alieno solo* which, in English Law, would be classed as "incorporeal hereditaments," but which by the law of India are included in immoveable property; and that therefore the limitation applicable to a suit for the recovery of the money was that provided in No 132, sch. ii of Act XV of 1877 (Limitation Act). *Dulli* v *Bahadur* (1) and *Pestonji Bezonji* v. *Abdool Rahiman* (2) dissented from. *Maharana Futtehsangji Jaswantsangji* v. *Desai Kullianraiji Hakoomutraiji* (3) referred to. *Lallubhai* v. *Naran* (4) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

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* Second Appeal No 157 of 1884, from a decree of W. Barry, Esq., District Judge of Jaunpur, dated the 3rd October, 1883, reversing a decree of Maulvi Nasrulla Khan, Subordinate Judge of Jaunpur, dated the 14th June, 1883.

(1) N.-W P. H. C. Rep. 1875, p. 55.
(2) I. L. R., 5 Bom. 463.
(3) 13 B L. R. 254.
(4) I. L. R. 6 Bom. 719.

Munshis *Kashi Prasad* and *Hanuman Prasad*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and DUTHOIT, J.) delivered judgment as follows:—

DUTHOIT, J.—This is an appeal from a decree of the Judge of Jaunpur, reversing a decree of the Subordinate Judge of Jaunpur, and decreeing the plaintiff's (respondent's) suit for the recovery from the estate of Kazi Ahmad Husain, in the hands of the Kazi's heirs, the defendants (appellants), and from the profits of taluka Dandari, of Rs. 1,129-10-0, with costs and future interest.

The facts may be thus stated:—Chatku Misr acted as *karinda* of Kazi Ahmad Husain for the management of taluka Dandari, and the Kazi was in the habit of taking advances of money from him. On the 2nd October, 1874, Rs 271 were found to be due to Chatku Misr. On that date the Kazi took a further loan of Rs. 300 in cash, and executed in favour of his creditor a bond by which he covenanted as follows:—

"I mortgage usufructuarily to the aforesaid *karinda* my entire right and share in taluka Dandari, in lieu of the aforesaid amount (Rs. 571-1-0), that he may realise the same from the profits of the year 1282 fasli, and from the arrears due by the tenants during the time of his incumbency, the liability for which he has accepted. On a settlement of accounts, should any money be found to remain due after deduction of the aforesaid amount, he may recover it from the profits of the year 1283 fasli. As soon as it is recovered, the mortgage possession will cease, and no excuses or pretexts will be allowed."

The Court of first instance (Subordinate Judge) held that the suit ought to have been brought within six years from the end of 1283 fasli (3rd September, 1876) and dismissed it as time-barred.

The finding of the lower appellate Court was in the following terms:—

"Plaintiff says the mortgage-money was not redeemed by the end of 1283 fasli, and that he was evicted on the 14th November, 1876, after the end of the fasli year 1283, which finished on the end of *Bhadon*, *i. e.*, 3rd September, 1876, that is to say, that

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plaintiff remained in possession for nearly six weeks after the end of the fasli year 1283. I think that art. 132, sch. ii of the Limitation Act is applicable. It is clear that the mortgagor mortgaged his rights and interests: – '*Tamam wa kamal hak wa hissa rahn pat bandhak karte hain.*' I do not find that he mortgaged merely the profits. The explanation that the plaintiff may realise the mortgage-money from the profits of 1882 and 1283 is superfluous; if he were not to realise from the profits, what else could he realise from?. And plaintiff was put in possession. I think the suit is not barred by limitation. The limitation is twelve years by art. 132."

It is contended in second appeal that the suit is time-barred, as not having been instituted (art. 116, sch. ii, Act XV of 1877) within six years from the 3rd September, 1876; and, in support of this contention, *Dulli* v. *Bahadur* (1) is cited. To which it is replied on behalf of the respondent :—

(*a*) That the bond of the 2nd October, 1874, created a charge upon immoveable property, and that art. 132, not art. 116 of sch. ii, Act XV of 1877, is therefore the limitation law applicable.

(*b*) That even if art. 116 be the limitation law applicable, the suit is still within time, having been instituted on the first day on which, after the expiry of six years from the 14th November, 1876, (the date of the cause of action) the Court was open.

The Civil Courts were closed in 1883 from the 15th October till the 26th November, both days inclusive, and the suit was therefore instituted on the first Court day after the vacation; but this fact will not assist the respondent's case unless the 14th November, and not the 3rd September, 1876, be the date of the accrual of the cause of action; or, in other words, only if, as is assumed in the plaint, but is denied by the defendants (appellants), the plaintiff (respondent) was, upon a true interpretation of the bond of the 2nd October, 1874, entitled, if the loan was not previously satisfied, to retain possession of the mortgaged property after the end of the year 1283 fasli.

Two points therefore arise for our decision, *viz.* :—

(i) Did, or did not, the bond of the 2nd October, 1874, convey to the plaintiff (respondent) a right to hold the mortgaged pro-

(1) N.-W. P. H. C. Rep, 1875, p. 55.

perty subsequently to the 3rd September, 1876, if the debt should not have been previously satisfied from the usufruct ?

(2) Did, or did not, the bond of the 2nd October, 1874, create a charge upon immoveable property ?

As regards the former of these points, we see no reason to doubt that the terms of the bond have been rightly interpreted by the Subordinate Judge ; that the expression "*wa jis wakt pat jawe, bila hechak uzr dahkl murtahinana kaladam tasawar kiya jawe*" refers to an event contemplated as occurring before, not after, the end of 1283 fasli ; that no right to hold property after the 3rd September, 1876, was conferred upon the plaintiff by the bond; and that the 3rd September, not the 14th November, 1876, was the date of the accrual of the cause of action.

As regards the latter point, we remark that the appellant's contention that the suit is not governed by the limitation provided in art. 132, sch. ii, Act XV of 1877, does certainly receive support from the decision of a Division Bench of this Court in *Dulli* v. *Bahadur* (1) and from a judgment of Sargent, J, in *Pestanji Bezanji* v. *Abdool Rahiman* (2). But we venture to doubt the soundness of the principle upon which the decision of the learned Judges of this Court (Pearson and Spankie, JJ.) in *Dulli* v. *Bahadur* (1) proceeded ; and the decision of Sargent, J., in *Pestonji Bezonji* v. *Abdool Rahiman* (2) has been overruled by a Full Bench decision of the Bombay Court in *Lallubhai* v. *Naran* (3), to which Sargent, C. J., was himself a party. We follow and approve the view of the law taken by the learned Judges of the Bombay High Court in the case last cited. Their Lordships of the Privy Council in *Maharana Futtehsangji Jaswantsangji* v. *Desai Kullianraiji Hakoomutraiji* (4) ruled that the expression "immoveable property," as used by the Indian Legislature, comprehends certainly all that would be real property according to English law, and possibly more. "In some foreign systems of law," their Lordships go on to say, "in which the technical division of property is into moveables and immoveables, as *e.g.*, the Civil Code of France, many things which the law of England would class as 'incorporeal hereditaments' fall within the latter category." And effect has been

(1) N.-W. P. H. C. Rep., 1875, p. 55.
(2) I. L. R. 5 Bom. 463.
(3) I. L. R. 6 Bom. 719.
(4) 13 B. L. R. at p. 265.

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given to this *dictum* of their Lordships in the Explanation to art. 132, sch. ii, Act XV of 1877. Even, therefore, if the words "the whole of my right and share in taluka Dandari," used in the bond of the 2nd October, 1874, could be treated as mere surplusage—a position which we must by no means be taken to admit—we should still be of opinion that the money borrowed by Kazi Ahmad Husain on the date in question was "money charged upon immoveable property;" for it was undoubtedly money charged upon rents and profits *in alieno solo*, which, in English law, would be classed as "incorporeal hereditaments," but which by the law of this country are included in "immoveable property." We are of opinion, therefore, that the law of limitation applicable to this suit is that provided in art. 132, sch. ii, Act XV of 1877, and that, as having been instituted within twelve years from the 3rd September, 1876, it was not time-barred.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

1884 *August* 15.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

RAMGHULAM AND ANOTHER (DEFENDANTS) *v* JANKI RAI (PLAINTIFF).*

Contract—Consideration—Uncertified adjustment of decree—Civil Procedure Code ss. 244 (*c*) 258—*Act IX of* 1872 (*Contract Act*), *ss.* 2, 10, 23, 28.

The consideration for a mortgage consisted partly of the amount of two decrees held by the mortgagee against the mortgagor. The mortgagee having sued to enforce the mortgage, the mortgagor pleaded failure of consideration as a bar to the enforcement of the mortgage. This plea was based on the allegation that the mortgagee had not certified the adjustment of the decrees, as provided by s 258 of the Civil Procedure Code, and they were still in force under the terms of that section.

Per DUTHOIT, J, that the failure of the mortgagee to certify the adjustment of the decrees did not constitute a failure of consideration, because he did not covenant to certify such adjustment, and it was not, in fact, necessary for him to do so; because he could not seek execution of the decrees on the ground that, though unsatisfied, they were still in force under s. 258 of the Civil Procedure Code, without becoming liable to penalties; and because, if the mortgagor considered the entering up of the adjustment of the decrees to be imperative, he had his remedy by application to the Court in the terms of s 258

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* Second Appeal No 1556 of 1883, from a decree of T. R Redfern, Esq., Offg. District Judge of Ghâzipur, dated the 3rd August, 1883, reversing a decree of Hakim Shah Rahat Ali, Additional Subordinate Judge of Ghâzipur, dated the 19th December, 1882.

Per MAHMOOD, J, that the adjustment of a decree out of Court, if never certified to the Court, is, under s. 258, ineffectual only so far as the execution of the decree is concerned; that there is nothing in the Contract Act to make such an adjustment invalid as the consideration for an agreement; that an agreement founded on such consideration may be enforced without defeating the objects of s. 258; and that consequently there was, in respect of the amount of the decrees, valid consideration for the mortgage.

Gunamani Dasi v. *Pran Kishori Dasi* (1), *Meer Mahomed Kazem Jouharry* v *Khetoo Bebee* (2), *Guni Khan* v. *Koonjo Behary Sein* (3), *Davlata* v. *Ganesh Shastri* (4), *Shadi* v. *Ganga Sahai* (5), and *Sita Ram* v. *Mahipal* (6), followed. *Patankar* v. *Devji* (7) and *Pandurang Ramchandra Chowghule* v. *Narayan* (8) dissented from.

ON the 20th June, 1881, Ramghulam and Prayag executed in favour of Janki Rai a document by which they acknowledged a debt of Rs. 700, on account of two unsatisfied decrees, and the receipt of Rs. 700, in cash; declared that in consideration of these two items, aggregating Rs. 1,400, they mortgaged usufructuarily to Janki Rai certain lands situate in mauzas Sagarpatti and Khizupur; and covenanted at once to repay the entire amount, with interest at the rate of 2 per cent. per mensem, if they failed to put the mortgagee in possession.

The present suit was brought upon the allegation that there had been such failure. The defence was a denial of that allegation; assertions that the consideration was not as stated in the document, but was the satisfaction of four (not two) outstanding decrees, and the payment, in cash, of Rs. 128 (not Rs. 700), and that no part of the consideration had been discharged; and a plea that, as the plaintiff had failed to enter up in Court the satisfaction of the decrees, those obligations were still in force, and the plaintiff ought, therefore, not to be allowed to put his bond in suit.

The lower appellate Court (District Judge of Ghazipur), reversing the decision of the Court of first instance (Subordinate Judge of Ghazipur), decreed the claim. It held that parol evidence at variance with the terms of the document was inadmissible, and found that the Rs 700 stated in the bond to have been paid in cash were actually paid; that as the plaintiff did not covenant to enter up satisfaction of the decrees, and he would now be unable to execute them without incurring heavy penalties, that part of the

(1) 5 B. L. R. 223; 13 W. R., F. B., 69.
(2) 20 W. R. 150.
(3) 3 Calc. L. R. 414.
(4) I. L. R., 4 Bom. 295.
(5) I. L. R., 3 All. 533.
(6) I. L. R., 3 All. 533.
(7) I. L. R., 6 Bom. 146.
(8) I. L. R., 8 Bom. 300.

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consideration also had fully passed, and that the plaintiff's allegations as to failure by the defendants to give possession of the mortgaged property had been established. From this decision the defendants appealed to the High Court.

Mr. *T. Conlan* and Munshi *Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgments:—

DUTHOIT, J. (After stating the facts, continued):—The only plea now urged before us is the second, *viz.*, that because the respondent has failed to enter up satisfaction of the two decrees, they are still in force, and the respondent, being in breach, is not competent to sue on his bond. The plea is ingenious, but has no real force. The respondent did not covenant with the appellants to enter up satisfaction of the decrees in Court, nor was it, in fact, necessary for him to do so. Were the respondent to seek execution of the decrees upon the plea that, although satisfied, they are still in force under the provisions of s. 258 of the Civil Procedure Code, he would surely be made to suffer in pocket, and probably in person also. Moreover, if the appellants considered the entering up of the adjustment of the decrees to be imperative, they had their remedy by application to the Court in the terms of s. 258 of the Code of Civil Procedure. I would dismiss the appeal with costs.

MAHMOOD, J.—I am of the same opinion. The real question in the appeal is, whether the decretal amount of Rs. 700 can be considered a valid consideration of the mortgage-deed to that extent, notwithstanding the fact that the plaintiff, who held those decrees, never certified to the Court that the decrees had been adjusted out of Court. The provisions of the law upon which the learned pleader for the appellant relies in support of his contention are contained in the last paragraph of s. 258 of the Civil Procedure Code, which lays down that "no such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid." And the learned pleader insists that the failure of the

plaintiff to certify to the Court the adjustment of the decrees amounts to failure to pay a part of the consideration, for the decrees are still alive and may be enforced and the decretal money realized thereunder, notwithstanding the mortgage, the terms whereof are sought to be enforced in this suit.

It seems to me that the determination of the point so raised depends upon the question whether the contingency contemplated by the argument of the learned pleader for the appellant can actually take place under the law; and, if so, whether the appellant would have any remedies open to him, in the event of his having to pay the decretal money in Court.

Provisions similar to the last paragraph of s. 258 of the Civil Procedure Code existed in s. 206 of the Code of 1859, and, whilst that Code was in force, it was held by a Full Bench of the Calcutta High Court in *Gunamani Dasi* v. *Pran Kishori Dasi* (1) that if a decree is adjusted out of Court, and the decree-holder, failing to certify such adjustment, executes the decree and realizes the amount thereof, the judgment-debtor can maintain a suit for compensation against the decree-holder. A similar view was taken in *Meer Mahomed Kazem Jowharry* v. *Khetoo Bebee* (2), and even after the passing of the Code of 1877, it was held by the Calcutta High Court in *Guni Khan* v. *Koonjo Behary Sein* (3), by the Bombay High Court in *Davlata* v. *Ganesh Shastri* (4), and by this Court in *Shadi* v. *Ganga Sahai* (5) that the law, on the point now under consideration, had undergone no change. The language of s. 258 of the Code of 1877 was, however, altered by s. 36 of Act XII of 1879, and the new section has re-appeared unaltered in the present Code. Upon the new section, a Division Bench of the Bombay High Court in *Patankar* v. *Devji* (6) held, with expression of regret, that the law had been altered, and that a suit for the recovery of money paid to a judgment-creditor out of Court, and not certified, was barred by cl. (*c*) of s. 244 read with the last paragraph of s. 258 of the Civil Procedure Code. If the law has been so altered, I entirely concur with the regret which the learned Judges expressed in that case. But has the law been so altered?

(1) 5 B. L. R 223; 13 W. R. F. B. 69.
(2) 20 W. R. 150.
(3) 3 Calc. L. R. 414.
(4) I. L. R. 4 Bom. 295.
(5) I. L R 8 All. 538.
(6) I. L. R. 6 Bom. 146.

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The learned Judges have not assigned any reasons for the conclusion at which they arrived, but there can be no doubt that that conclusion is in direct conflict with the ruling of this Court to which I have already referred, and with another case, *Sita Ram* v. *Mahipal* (1), in which Straight, J., explained the phrase "*any Court*," as it occurs in the last paragraph of s. 258, to have reference to proceedings in execution, and to the Court or Courts executing a decree. Having considered the question, and with due deference to the ruling of the Bombay Court in the case of *Patankar* (2), I find myself unable to concur in the view of the law taken in that case. There can be no doubt that an adjustment of decree out of Court, if not certified according to s. 258, cannot be taken into account in executing the decree. Such was the law under the Code of 1859, it remained unaffected by Act XII of 1879, and it is so under the present Code. In the Code of 1877, the phrase "*such Court*" occurred, and the word "*such*" has given place to the word "*any*" in the last paragraph of s. 258 of the present Code. Perhaps it was in view of this change of language that it was ruled in *Patankar* v. *Devji* (2) that the law had undergone a serious change. I confess I am unable to entertain any such opinion. The leading case upon the subject is the Full Bench ruling of the Calcutta High Court to which I have already referred, and although the language of s. 258 of the present Code is, in many respects, different from the wording of s. 206 of the Code of 1859, it seems to me that the *ratio decidendi* upon which that ruling proceeds is applicable in principle to the section of the present Code. The section lays down no rule of substantive law relieving parties from the legal consequences of valid contracts, nor, indeed, can the section be regarded as a rule of evidence barring the proof of facts which have actually occurred. The section occurs in a Code regulating civil procedure, in a chapter which relates to execution of decrees, and the only object it can have in view is to remove the inconvenience which would otherwise arise in connection with the execution of decrees in cases in which adjustment out of Court is pleaded. Beyond this it seems to me the section can have no effect. It cannot affect Courts which are not concerned with the question of execution of decree, but with a separate suit

(1) I. L. R. 3 All. 533. (2) I. L. R., 6 Bom. 146.

in which the cause of action alleged is the breach of a valid contract by which the decree-holder has bound himself not to execute the decree. The Court executing the decree is bound to recognize no adjustment of that decree if such adjustment is not duly certified ; but this only shows that such uncertified adjustment is expressly declared by the statute to be a question *not* " relating to the execution, discharge or satisfaction of the decree" within the meaning of cl. (*c*) of s. 244 of the Code. So that the last paragraph of s. 258, far from rendering the provisions of s. 244 a bar to the entertainment of a separate suit in connection with such uncertified adjustments, has quite the contrary effect. I therefore adhere to the view which the Calcutta Court and this Court have uniformly taken of the rule of law which prohibits uncertified adjustment of decrees from being recognized by the Courts concerned in executing those decrees.

I have considered it necessary to dwell upon this question at such length because if I had taken the same view of the law as was taken in *Patankar* v. *Devji* (1), I do not think that the decretal amount of Rs. 700, which forms a part of the consideration of the mortgage-deed in the present case, could be regarded as a valid consideration in the absence of certifying the adjustment of the decrees to the Court concerned in their execution. Indeed, such a view of the law was actually taken by the Bombay High Court in *Pandurang Ramchandra Chowghule* v. *Narayan* (2), wherein Sargent, C. J., with the concurrence of Kemball, J., laid down the rule that " the adjustment of the decree, not having been certified to the Court, was not binding on the plaintiff, and therefore constituted no valid consideration" of the bond on which the suit was based. The ruling is directly applicable to the present case, and necessarily proceeds upon an implied approval of the rule laid down in *Patankar* v. *Devji* (1) from which I have aleady expressed my dissent. The later ruling is, indeed, the logical consequence of the earlier case. The respect that we owe to the ruling of the Bombay High Court makes it incumbent upon me to explain my reasons for declining to adopt the rule laid down in the later of those cases. The learned Judges in that case went to the length of laying down that " the bond

(1) I. L. R. 6 Bom. 146. (2) I. L. R 8 Bom. 300.

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was void without consideration" because an uncertified adjustment of decree "constituted no valid consideration." So far as the question of procedure is concerned, I have already endeavoured to show that the prohibition against the recognition of uncertified payments cannot be understood either as a rule of evidence or as a rule of the law of contract. The Indian Contract Act (IX of 1872) cannot be taken to have been amended or modified by the last paragraph of s. 258 of the Civil Procedure Code; and in the former of these enactments clear rules are laid down as to the validity of consideration and contract. S 2 of the Act thus defines consideration:—"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." Then an agreement is defined to be "every promise and every set of promises forming the consideration for each other;" and it is laid down that "an agreement not enforceable by law is said to be *void*." But "an agreement enforceable by law is a contract." "Contract" therefore includes the element of legality in the sense in which it is used in the Act, and s. 10 provides that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a *lawful consideration* and with a *lawful object*, and are not hereby expressly declared to be void." The only other section which I need quote is s. 23, which provides that "the consideration or object of an agreement is lawful, unless—(1) it is forbidden by law; or (2) is of such a nature that, if permitted, it would defeat the provisions of any law; or (3) is fraudulent; or (4) involves or implies injury to the person or property of another, or (5) the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void." Now, the Bombay ruling which I am considering, lays it down as a settled rule of law that a bond executed in adjustment of a decree, such adjustment not having been certified to the Court, renders such contract void, and the reason assigned is that it must be regarded as "without consideration," for the consideration was invalid.

It seems to me that the sections of the Contract Act which I have already quoted justify no such conclusion. The promise or undertaking on the part of a decree-holder not to execute his decree, or the acceptance by him of a bond, a mortgage, or other similar contract as satisfaction of the decree, is undoubtedly a consideration within the meaning of s. 2 of the Contract Act, and the transaction constitutes an agreement which amounts to a "*contract*" under s. 10, unless it can be shown that the *consideration* or *object* of the agreement was *unlawful* within the meaning of s. 23, which I have already quoted. Is there then anything to show that the consideration or object in such a contract "is forbidden by law?" In the Contract Act itself ss. 24—30 lay down what agreements are void, but none of these provisions applies to a contract such as the one now under consideration. S. 28 might at first sight appear to be applicable, but it seems to me that the prohibition contained in the section is limited to agreements in restraint of legal proceedings for enforcing "rights under or in respect of any *contract*," which must be understood in the sense in which the Act defines it, and cannot be held to include rights under a decree. If then such contracts are not forbidden by the Contract Act, where is the prohibition to be found? The last paragraph of s. 258 of the Civil Procedure Code contains no such prohibition. It simply lays down that the Court in discharging its duties connected with the execution of decrees shall not recognize any adjustment of those decrees made out of Court and never certified to the Court, but the provision falls far short of justifying the view that all contracts by which decrees are adjusted out of Court are in themselves "forbidden by law," that they are therefore illegal when entered into, but become legal the moment the adjustment is certified to the Court. The paragraph lays down no rule of substantive law; but simply a rule of procedure suggested by considerations of convenience similar in principle to those which form the reason of the rules by which the frame of suits, the right of set-off, and other provisions of adjective law, are governed. And it seems to me that there is scarcely any more reason in principle for saying that uncertified adjustments of decree give no right, because the Courts are prohibited from recognizing them, and the judgment-debtor cannot plead them in execution of those decrees, than there would be for the proposition

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that, because s. 111 of the Civil Procedure Code does not allow certain obligations of the plaintiff to be pleaded as set-off to his claim, therefore those obligations cannot be enforced by a separate suit.

Referring still to s. 23 of the Contract Act, I proceed to consider whether the adjustment of a decree out of Court, without such adjustment being certified, is an agreement of "such a nature that, if permitted, it would defeat the provisions of any law." I suppose there is no provision of the law except s 258 of the Civil Proce-Code, which can possibly be taken to be defeated by permitting an uncertified adjustment of decree out of Court to possess the validity of a contract. But I have already stated my reasons for the view that the sole aim and end of s. 258 of the Civil Procedure Code, in common with all other rules of adjective law, is to facilitate the disposal of litigation; and this object is in no manner defeated by permitting agreements out of Court by which a decree is adjusted. The Court executing the decree will, of course, not recognize them if they are not duly certified, but this circumstance in itself shows that the provisions of the law cannot be defeated. For the view which I have taken does not involve the recognition of such uncertified adjustments by any Court in the exercise of its functions under s. 258 of the Civil Procedure Code. My view is that such adjustments, if made by an agreement, amount to a contract which does not and cannot defeat the objects of s. 258 of the Civil Procedure Code, but gives birth to a new right which may be enforced in a separate suit, and not in the proceedings taken in the execution of the decree adjusted by such agreement.

It is not necessary to consider the remaining clauses of s. 23 of the Contract Act, because it is scarcely conceivable that any arguments can even plausibly be based on any of those clauses against the view which I have taken. And if this is so, I confess I fail to see why an agreement, the consideration and objects of which are not "forbidden by law," which is not "of such a nature that, if permitted, it would defeat the provisions of any law," should be considered as a void agreement, incapable of giving birth to a right the breach of which would constitute a valid cause of action for a separate suit. And I may add that the view which I have taken is

consistent with the interpretation placed upon cl. (2) of s. 23 of the Contract Act by the Lords of the Privy Council in *Seth Gokul Dass Gopal Dass* v. *Murli* (1) which involved a point of law similar in principle to the case now before us.

I hold that the adjustment of a decree out of Court, if never certified to the Court, is ineffectual only so far as the execution of that decree is concerned; but that, if such adjustment is made by an agreement in itself valid, such agreement, like other lawful contracts, becomes the basis of a right, which, if infringed, can afford a cause of action for a separate suit, notwithstanding the provisions of s. 244 of the Civil Procedure Code. There is no provision in our law which renders such agreements void or otherwise illegal; and in the present case, if the plaintiff-respondent attempts, in breach of the contract contained in the mortgage-deed, to execute the decrees the amount whereof has already been included in the consideration of the deed, he will render himself liable to a separate suit by the defendant-appellant, in which full relief could be awarded. What the nature of such relief may be, it is unnecessary for the purposes of this appeal to determine, for it depends upon circumstances which we cannot anticipate. I may, however, add that in the case of *Nujeem Mullick* v. *Erfan Mollah* (2) it was held that a suit to enforce a contract by which a dispute was adjusted between a decree-holder and a judgment-debtor could be maintained; and in *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* (3) it was laid down that the Court could, at the suit of the judgment-debtor, issue an injunction restraining the judgment-creditor from executing his decree. A similar view was taken in *Dhuronidhur Sen* v. *Agra Bank Limited* (4), and without discussing the rules laid down in the various cases, I may safely say that there is ample authority in the reports to show that in case of breach of the contract by which a decree has been adjusted out of Court, but such adjustment has never been certified, the law does not leave the injured judgment-debtor without a remedy. Indeed, so long as it is conceded that such adjustments are not in themselves illegal, they must be held to give birth to a right, and the law contemplates no rights without a remedy—*ubi jus ibi remedium.*

(1) I. L. R. 3 Calc. 602; L. R. 5 Ind. Ap. 78.
(2) 22 W. R. 298.
(3) 22 W. R. 194.
(4) 4 Calc. L. R. 434.

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Applying these principles to the present case, the decretal amount of Rs. 700 was a valid consideration, to that extent, of the deed upon which the suit from which this appeal has arisen was based. The findings of the lower appellate Court on the merits preclude us from considering any other question in second appeal, and I therefore agree with my brother Duthoit in dismissing this appeal with costs.

Appeal dismissed.

1884. *August* 28.

CRIMINAL REVISIONAL.

Before Mr. Justice Duthoit.

JHINGURI *v* BACHU AND ANOTHER

Criminal Procedure Code, ss 435, 437 —Power of District Magistrate to direct further inquiry by Magistrate of the first class—" Inferior Magistrate."

Where a District Magistrate called for the record of a case in which a Magistrate of the first class had discharged certain accused persons, and directed another Magistrate of the first class to make further inquiry into the case, *held*, following *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1) and *Queen-Empress* v. *Nawab Jan* (2), that the District Magistrate's order was *ultra vires* and illegal.

THIS was a case referred to the High Court for orders, under s. 438 of the Criminal Procedure Code, by Mr. R. J. Leeds, Sessions Judge of Gorakhpur. On the 25th January, 1884, one Jhinguri preferred charges, under ss 379, 427, and 447 of the Penal Code, against two persons named Bachu and Chutkan, in the Court of Munshi Chet Ram, Magistrate of the first class, Basti. After evidence had been taken on both sides, the case was dismissed by an order dated the 28th April, 1884.

On the 30th April an application, under s. 435 of the Criminal Procedure Code, was made to the Magistrate of the Basti District by the complainant, Jhinguri, and on the 29th May a further inquiry by another Magistrate of the first class was directed.

The Sessions Judge of Gorakhpur, in his report to the High Court under s. 438, recommended that the order of the Magistrate of the Basti District, directing further inquiry, should be set aside, on the ground, "*inter alia*," that the Court of Munshi Chet Ram, a Magistrate of the first class, whose orders of conviction under the Penal Code were appealable to the Sessions Judge, was not, as

(1) I. L. R., 10 Calc. 268. (2) I. L. R., 10 Calc. 551.

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regards the particular case in question, "inferior" to the District Magistrate, within the meaning of s. 435 of the Criminal Procedure Code, and that therefore the District Magistrate had no authority either to call for the record or to direct further inquiry to be held.

The Court made the following order:—

DUTHOIT, J.—Munshi Chet Ram was, by Government Notification No. 724, dated the 30th May, 1882, appointed "to be Magistrate of the first class during such time as he acts as a Deputy Collector;" and, in answer to an inquiry on the subject, the Sessions Judge of Gorakhpur has reported that Munshi Chet Ram has continuously exercised those powers since the date of the Notification, and has not since ceased to officiate as a Deputy Collector.

Following and approving the view of the law taken by the learned Judges of the Calcutta Court in *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1) and in *Queen-Empress* v. *Nawab Jan* (2), I am of opinion that the order of the Magistrate of the Basti District, dated the 29th May, 1884, was *ultra vires* and illegal. I set it aside accordingly. Let the record be returned.

Before Mr. Justice Duthoit.

1884 *October* 24.

QUEEN-EMPRESS *v.* SINHA.

High Court's powers of revision—Criminal Procedure Code, s 439—Revision of case in which term of imprisonment has been served.

The High Court is competent, in the exercise of its powers of revision under s. 439 of the Criminal Procedure Code, to interfere with a conviction, even though, in consequence of the expiry of the sentence, it may not be possible to interfere with the latter.

THIS was an application to the High Court for the exercise of its powers of revision under s. 439 of the Code of Criminal Procedure. The applicant had been convicted by a Magistrate of an offence under s. 26 of Act IV of 1879 (Indian Railway Act). The Court called for the record of the case, but before the application came on for hearing, the applicant had served the term of imprisonment to which he had been sentenced.

(1) I. L. R., 10 Calc. 268. (2) I. L. R., 10 Calc. 551.

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QUEEN-EMPRESS v. SINHA.

A preliminary objection was taken on behalf of the Crown to the hearing of the application on the ground that the sentence could not be interfered with.

Mr. *A. Strachey*, for the applicant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the Crown.

DUTHOIT, J.—The applicant has served his term of imprisonment, and a preliminary objection is urged by the learned Junior Government Pleader to the effect that as, since the application was filed, the effect of the finding of the Magistrate has become complete, this Court cannot interfere with that finding. I am unable to admit the force of this contention. I can find nothing in the terms of the law to prevent this Court from interfering with a conviction, even though, in consequence of the expiry of the sentence, it may not be possible to interfere with the latter. And cases in which such interference should not be summarily refused may easily be supposed, as, for instance, where a man's *status* is altered by his conviction, (as in convictions under Chapter XII or XVII of the Indian Penal Code, or under the Common Gambling Act), or where, as here, the convict's prospect of future employment depends in a great measure upon the existence or the annulment of the conviction.

(The learned Judge then proceeded to deal with the application on the merits).

APPELLATE CIVIL.

1884 *November 4.*

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

SOHAN LAL (PLAINTIFF) *v.* AZIZ-UN-NISSA BEGAM AND OTHERS (DEFENDANTS).*

Remand—Appeal from order of remand—Civil Procedure Code, ss. 562, 564, 566, 584, 588 (28), 590.

Where a lower appellate Court, instead of remanding a suit under s. 566 of the Civil Procedure Code, erroneously remands it under s. 562, and the party aggrieved by its order appeals to the High Court, under clause (28), s. 588, the High Court cannot deal with the case as if it were a first appeal from a decree.

* First Appeal No. 11 of 1884, from an order of Mirza Abid Ali Beg, Subordinate Judge of Shâhjahânpur, dated the 3rd December, 1883.

All that the High Court can do is to rectify the procedure of the lower appellate Court, and to direct that it decide the case itself on the merits.

Badam v *Imrat* (1) distinguished. *Ramnarain* v. *Bhawanidin* (2) and *Sheoamber Singh* v. *Lallu Singh* (3) referred to.

THE suit in which this appeal arose was one for the sale of certain property mortgaged by the defendants to the plaintiff on the 22nd September, 1874. It was stated in the instrument of mortgage that the mortgagors should retain possession. On the 25th September, 1874, three days after the mortgage, the defendants gave the plaintiff a lease of the mortgaged property for five years, and the plaintiff subsequently obtained possession. The defence to the suit was that the plaintiff was in possession of the mortgaged property as an usufructuary mortgagee, and the mortgage-money had been repaid from the usufruct of the property. The plaintiff's contention was that the mortgage was only a simple mortgage, and he was not in possession as a usufructuary mortgagee, but merely as a lessee. The Court of first instance (Munsif) allowed the plaintiff's contention and gave him a decree for the sale of the property, in the terms provided by ss. 86 and 88 of the Transfer of Property Act, 1882. On appeal by the defendants the lower appellate Court (Subordinate Judge) was of opinion that the lease "was simply a plan adopted for payment of the mortgage-money," and that further inquiry should be made "whether the plaintiff-mortgagee held possession as a lessee," and "whether the mortgage amount with interest had been paid up from the lease-money." The Court accordingly decreed the appeal, reversed the decree of the Court of first instance, and remanded the case to the Munsif for the determination of the questions above referred to.

The plaintiff appealed to the High Court, on the grounds that the order of remand by the lower appellate Court was opposed to the clear terms of the lease and the mortgage; that it was unsupported by evidence; and that it proceeded on the assumption that oral evidence was admissible to vary or add to the terms of the documents in question.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

(1) I L R, 3 All. 675. (2) Weekly Notes, 1882, p. 104.
(3) Weekly Notes, 1882, p. 158.

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Mr. *T. Conlan* and the *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment :—

MAHMOOD, J.—This is a first appeal from an order of the lower appellate Court, remanding the case to the Court of first instance under s. 562 of the Civil Procedure Code for trial *de novo*.

Having considered the judgment of the lower appellate Court, we have no doubt that the order contravenes the express provisions of s. 562 and s. 564 of the Civil Procedure Code. Under the former of these sections, the only ground for setting aside the decree of the Court of first instance can be that "the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, so as to exclude any evidence of fact which appears to the appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal." S. 564 expressly prohibits the remand of a case for a second decision except as provided in s 562.

In the present case, the judgment of the Court of first instance did not proceed upon any preliminary point, nor did that Court exclude any evidence of fact within the meaning of s. 562. The lower appellate Court's judgment is obviously framed in language adapted to an order of remand under s. 566 of the Civil Procedure Code, and the reasons given by that Court could not necessitate a remand under s. 562. The lower Court's order cannot stand ; but the learned pleader for the appellant asks us to dispose of the case finally, without sending it back to the lower appellate Court. He contends on the authority of the Full Bench ruling of this Court in *Badam* v. *Imrat* (1) that we are bound, even at this stage, to enter into the merits of the whole case, and to dispose of it finally.

We are of opinion that this contention is not sound. The Full Bench ruling upon which the learned pleader relies does not go to the extent of supporting his contention. All that was ruled in that case was, that an appeal from an order remanding a suit for re-trial is not to be confined to the question whether the remand has been made contrary to the provisions of s. 562 of the Civ

(1) I. L. R., 3 All. 675.

Procedure Code; but that the question whether the decision of the appellate Court on the preliminary point is correct or not, may also be raised and determined in such an appeal. In the case before us the judgment of the lower appellate Court does not, as we have already said, proceed upon any preliminary point which we can determine at this stage. The judgment professes to deal with the merits of the case, though the result of the reasons would be a remand under s. 566, and not under s. 562.

It is to be observed that the case from which this appeal has arisen is one which can come up before us only in second appeal, and we are of opinion that the circumstance that this appeal is a first appeal from order under the provisions of cl. (28), s. 588 of the Civil Procedure Code, would not alter the nature of the powers to be exercised by us in second appeals under s. 584 of the Civil Procedure Code. In other words, we cannot deal with the case as if it were a first appeal from a decree. In the case of *Ram Narain* v. *Bhawanidin* (1) and in *Sheoambar Singh* v *Lallu Singh* (2) to both of which one of us was a party, the powers of this Court in its jurisdiction as the second appellate Court were discussed. The observations made in those cases appear to us to be applicable in principle to the present case. S. 590 of the Civil Procedure Code renders Chapter XLI of the Code applicable to such appeals as the present only *mutatis mutandis*; and we cannot regard that section as binding us to enter into the merits of the whole case simply because the lower appellate Court, instead of remanding the case under s. 566, has erroneously remanded it for new trial under s. 562. In our opinion the functions of this Court in appeals under cl. (28), s. 588, are limited to disposing of such points as properly fall within the scope of s. 562. No such point exists in this case, and all that we are called upon to do is to rectify the procedure adopted by the lower appellate Court in the matter of the remand, and to direct that Court to decide the case itself on the merits. The questions raised before us in the memorandum of appeal may be proper questions for disposal after the lower appellate Court has pronounced its final judgment and decree; but they cannot be disposed of at this stage. The logical consequence of the contrary view would be, that in every case in which the

(1) Weekly Notes, 1882, p. 104. (2) Weekly Notes, 1882, p. 158.

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lower appellate Court passes an erroneous order of remand for re-trial under s. 562, and an appeal is preferred to this Court under cl. (28) of s. 588, the functions of this Court, in cases like the present, instead of being confined to matters described in s. 584 of the Code, would be converted into those of the first appellate Court; in other words, an erroneous order of remand by the lower appellate Court would have the effect of converting into a first appeal a case which could only be the subject of second appeal.

For these reasons we decree this appeal, and setting aside the order of the lower appellate Court, remand the case to that Court, with directions to restore the case to its own file, and to dispose of it according to law. The costs of this appeal will be otsst in the cause.

Appeal allowed.

1884 *November* 5.

Before Mr. Justice O'dfield and Mr. Justice Mahmood.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* RAM UGRAH SINGH AND OTHERS (PLAINTIFFS).*

Liability of land to assessment of revenue—Jurisdiction of Civil Court—Declaratory decree—Act XIX of 1873 (*N.-W. P. Land Revenue Act*), *s.* 241.

The Civil Courts are not debarred by s. 241 of Act XIX of 1873 (N.-W. P. Land-Revenue Act) from taking cognizance of a suit for a declaration that land, which the revenue officers seek, under the provisions of that Act, to assess to revenue, is included in an area which has already been permanently settled, and is therefore not liable to further assessment.

A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue free.

The Goverment v. *Rajah Raj Kishen Singh* (1); *Collector of Futtehpore* v. *Munglee Pershad* (2); *Rajah Rughonath Suhaee* v *Bishen Singh* (3); *Zoolfikar Ali* v. *Ghunsam Baree* (4); and *Sri Uppu Lakshmi Bhayamma Garu* v. *Purvis* (5) referred to.

THE fact of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *T. Conlan* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Mr. *C. H. Hill*, Munshi *Hanuman Prasad*, Munshi *Sukh Ram*, Babu *Sital Prasad*, and Lala *Jokhu Lal*, for the respondents.

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* First Appeal No. 81 of 1881, from a decree of Maulvi Muhammad Abdul Majid Khan, Subordinate Judge of Ghâzipur, dated the 28th April, 1881.

(1) 9 W. R. 427.
(2) N.-W. P. S. D. A. Rep., 1854, p. 167.
(3) N.-W. P. S. D A. Rep., 1855, p. 302.
(4) N.-W. P. S. D. A. Rep., 1865, p. 92.
(5) 2 Mad. H. C. Rep., 167.

The judgment of the Court (OLDFIELD and MAHMOOD, JJ.) was delivered by—

OLDFIELD, J.—The suit, which is the subject of this appeal, was instituted on the 26th February, 1880, by Babu Ram Ugrah Singh and others, against the Secretary of State for India in Council, through the Collector of Ballia.

The case of the plaintiffs is briefly that the lands, the subject of the dispute, consisting of mauzas Kheru Chapra, Marwatya, and Rampur, belonging to taluqa Kharauni, formed portions of the above mauzas at the time they were leased to them in the decennial settlement made in 1197 fasli,—*i.e*, 1790 *A. D.*, by Mr. Duncan, afterwards converted into a permanent settlement under Regulation I of 1795; they allege that the boundary of the taluqa was the main channel of the Gogra, situated as it is now, and that the taluqa was south of it, and comprised the lands in dispute; that in 1879 the revenue authorities re-measured the lands of the mauzas, and treated the area disputed as alluvion, accreted since 1790 *A. D.*, and made an assessment upon it in contravention of their right; and the relief sought by the plaint of the plaintiffs, as amended in April, 1881, is that a decree be passed in favour of the plaintiffs, who allege themselves to be still in actual possession, for declaration of their right to these lands on the ground that they form part of the area in respect of which the permanent settlement was made, and by right of ancient hereditary possession; and that the orders of the Assistant Collector of Ballia, dated the 3rd April 1879, and of the Commissioner of Benares, dated the 14th October, 1879, be declared invalid and ineffectual, so far as they are prejudicial to the plaintiffs' rights.

The first of these orders is by the Assistant Collector, directing that the plaintiffs be asked whether they will accept the assessment, and the second that of the Commissioner's, directing that the plaintiffs' appeal from the Assistant Collector's order, dated 3rd April, 1879, be dismissed.

The defence is, that the boundary of the taluqa, which was leased in the decennial settlement in 1790 or 1197, was the nullah Bahera, the southern branch of the Gogra, and these lands are to the north of it, and excluded from the permanently settled area;

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that the total area of the three mauzas Rampur, Kheru Chapra, and Marwatya, permanently settled with the plaintiffs, was 2,200 bighas, which is still the area south of Bahera nullah; that the disputed lands, which are called "*Diara*" †, were not in existence then, but accreted subsequently, or if they did exist at that time, they appertained to the muafi mahal in the Saran district, on the other side of the river Gogra; that in 1800 or subsequently the stream of the Gogra left the nullah Bahera and began to flow to the north, thus transferring the lands in dispute to the south of the main channel, as accretions to the plaintiffs' mauzas, and such accretions became liable to assessment under s. 104, Act XIX of 1873, and the old Regulations; that the plaintiffs cannot contest the right of the Government to make a settlement and assess revenue.

The Subordinate Judge, in a very carefully considered judgment, has found that the plaintiffs have proved that the lands in dispute form part of the area which was permanently settled with their ancestors; and he further considered that, by length of possession free from further assessment, they have established a right to hold these lands free from assessment of revenue; that there is no law which precludes a Civil Court from entertaining a claim to contest the right of Government to collect revenue from any zamindar in excess of the amount sanctioned by Government, or to fix a new enhanced demand on mahals settled for a term before that term expires, or on permanently settled mahals; that a Civil Court can at any rate do so much as to declare the zamindar's two-fold right that the land which is being newly assessed is part of the land settled previously, on which an assessment cannot be made, or that, owing to the lapse of a term of sixty years, the zamindar has acquired a right to hold the land for the future in the same way and manner, without paying a new or increased revenue, as he has hitherto held it; and he adds that the plaintiffs pray only for a declaratory decree regarding the above point and not the other points; and the Subordinate Judge makes a decree declaring that the land in dispute was not excluded from the true area of plaintiffs villages, and reference to which has been made in the decennial settlement, at the time of the perma-

† "*Diara*,"—A tract of alluvial land.

nent settlement, but that it is included in the permanent settlement; that if it be otherwise, the defendant has no longer a right to fix a revenue on the land in dispute owing to lapse of time; and allows plaintiffs their costs.

The defendant has appealed, and the objections may be summed up to be—

1. In regard to the lower Court permitting the plaintiffs to amend their plaint.

2. That no declaratory decree can be given, especially as the plaintiffs are out of possession; and that the Government has adopted proceedings to realize the revenue assessed.

3. That it is not proved that the land in dispute formed part of the area of taluqa Kharauni settled with the plaintiffs; but on the contrary it did not form portion of that taluqa, and was not settled with any one.

4. That a decision made in 1839 as to this land has become final.

5. That the plaintiffs cannot obtain a right to hold the land free from assessment of revenue by long possession.

6. That the Civil Court has no power to question or set aside settlements of land or assessments of revenue.

(After disallowing the two first objections, the judgment continued):—The next, in the order in which I have put them, relates to the decision on the merits; and I concur in the conclusions which the Subordinate Judge has arrived at, as the result of his very careful examination of the evidence in the case.

(After referring to and commenting on the evidence, the judgment continued):—The facts above recited sufficiently show, in my opinion, that these lands were part of the area permanently settled with them.

(After a recapitulation of the facts the judgment continued):—

I think the above facts sufficiently establish the plaintiffs' title. I do not, however, agree with the Subordinate Judge in holding that any length of possession of these lands free from revenue would give plaintiffs a title by prescription to hold them free from assessment with revenue.

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The above remarks dispose of the case on the merits.

There are, however, some legal questions to be considered.

(After holding that the fourth objection was clearly untenable, the judgment continued) :—The next point is the jurisdiction of the Civil Court in this suit.

It is to be observed that the Subordinate Judge has not decreed that portion of the claim which seeks to set aside orders of the Revenue authorities, and the decree he has made is confined to a declaration that the land in suit was not excluded from the area of the plaintiffs' villages, but on the contrary was included in the area permanently settled with them; and to a further declaration that, were it otherwise, the defendant has no right to make a new assessment of revenue upon the lands owing to lapse of time.

The declaration contained in the last part of the decree must be cancelled, since, as already stated, limitation cannot be pleaded against the right of the State to assess with revenue lands hitherto held revenue free.

The decree of the Subordinate Judge will then be limited to a declaration that the lands in suit formed part of the area that was permanently settled with the plaintiffs' ancestors at the decennial settlement, and such a decree does not appear open to any objection on the ground that the Civil Court has no jurisdiction to make it.

The question raised and dealt with is whether the plaintiffs have a right to the lands as forming part of a mahal held by their ancestors under decennial leases in 1790, and subsequently settled with them under a permanent settlement, which in consequence are not legally liable to further assessment for revenue; or, on the other hand, the lands formed no part of such area, and have subsequently accreted, and are liable to be assessed. The decree does no more than declare rights which the plaintiffs have had conferred upon them in pursuance of enactments of the Legislature, and the adjudication upon such rights is within the province of the Civil Courts, whether or not there may be involved questions of the liability of land to assessment for revenue.

We have here no question properly of the Civil Court's jurisdiction being excluded in respect of acts done in the exercise of

sovereign powers, for the suit is for alleged wrongful acts of the Revenue officers in violation of rights conferred on the plaintiffs by the Legislature; and the Civil Court's jurisdiction does not appear to be excluded by express legislation in s. 241 of the Land Revenue Act, which has specified the matters over which Civil Courts exercise no jurisdiction.

The matter does not come under (*b*), s. 241. There is here no question of the claim of any person to be settled with, or the validity of any engagement with Government for the payment of revenue, or the amount of revenue to be assessed on any mahal or share of a mahal.

(*D*), s. 241, allows the Civil Courts no jurisdiction over the "matter of the notification of settlement," but we are not in this suit concerned with that. The notification referred to is probably that made under s. 36, which directs that "when ever the Local Government thinks that any district or other local area liable to be brought under settlement should be so brought, it shall publish a notification specifying such area."

The expression "matter of the notification of settlement" is very vague, but possibly it was only intended not to allows suit to set aside settlements on the ground that the notification was not duly issued; and however this may be, the claim decreed does not touch upon the legality of the notification. A Civil Court may declare certain lands to be part of an area already permanently assessed for revenue, and in consequence not liable to further assessment, without interfering with the notification.

The only part of s. 241, which has been referred to in order to oust the jurisdiction of the Civil Court, is cl. (*h*), namely, matters provided for in ss. 79 to 89, which refer to the resumption of rent-free grants and liability of rent-free lands for Government revenue; but obviously the matter in this suit is not one of those. The case referred to by the Subordinate Judge—*The Government* v. *Rajah Raj Kishen Singh* (1)—appears to support the view here taken. The plaintiff in that case sued to have his right declared to certains lands as part of a mahal permanently settled, and to set aside a survey and proceedings incidental to it, by which the lands

(1) 9 W. R. 427.

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were claimed by the defendant as excluded from plaintiff's permanently settled mahal. It was held that the Civil Courts had jurisdiction in the matter. The difference between that case and the one before us is, that in that case the Government had not, as here, recognized the proprietary right of the plaintiff to the lands, or made an assessment of the lands, and offered to settle them with him.

The case of *Collector of Futtehpore* v. *Munglee Pershad* (1) is very much in point. The object of the suit was to resist the demand of Government for the revenue of certain lands, on the ground that they had already been assessed with revenue, and the plaintiffs were not liable to be called on to pay the same amount twice over; and the claim was entertained and allowed. The Court observed:—"The majority of the Court disclaim all intention in this judgment of interfering with the Government's acknowledged power of determining the assessments of the revenue: with this power the Civil Courts have no authority to interfere, nor do the majority of the Court interfere with it in the present instance. They merely declare judicially that the Government has, through its revenue officers, assessed the land in dispute as part and parcel of the villages of the respondents, who are not legally subject to any further demand on that account."

In *Rajah Rughonath Suhaee* v. *Bishen Singh* (2), which was a suit brought to set aside an order passed by the revenue authorities, by which defendants were admitted to the settlement of mauza Sirsya to the exclusion of plaintiff, in contravention of a settlement which had previously been made with plaintiff, the Sudder Court held that the existing Regulations confer no power on the revenue authorities of remodelling at their will and pleasure settlement arrangements regularly entered into, so long as the party admitted to settlement fulfils the terms of his engagement, and the Court allowed the claim, finding on the facts in the case that the party admitted to the direct management of the estate had no rights in it beyond those of a mere ryot or cultivator.

The case of *Zoolfikar Ali* v. *Ghunsam Baree* (3) may also be referred to, to show that the Civil Courts have exercised jurisdic-

(1) N.-W. P. S. D. A Rep., 1854, p. 167. (2) N.-W. P S D. A. Rep., 1855, p 302.
(3) N.-W. P S D. A Rep., 1865, p. 92.

tion to enforce rights of parties under a settlement, and to set aside orders of the revenue authorities in contravention thereof. A case decided by the Madras High Court—*Sri Uppu Lakshmi Bhayamma Garu* v. *Purvis* (1)—may also be referred to. The question was the jurisdiction of the Civil Courts to entertain a suit brought to try a question of liability to the public revenue assessed upon land. The plaintiff sought to establish, as the judgment states, that the lands were legally exempt from an additional assessment to the water-rate, on the ground, first, of a right by long enjoyment of the free supply of the same quantity of water from an old canal, (of which it was alleged the Government officer had cut off the supply), as was obtained from a new canal which they had made, and with reference to the supply from which the plaintiff had been assessed with water-rate; and secondly, on the ground that the lands were of the description excepted from the assessment by the rules promulgated by the Board of Revenue for the levying of the water-rate. The Court (Scotland, C.J., and Phillips, J) observed:—"The suit, then, is clearly a suit of a civil nature, brought for alleged wrongful acts by an executive officer of Government, and, in the absence of any express legal enactment or provision, we think the circumstance that the acts complained of were done in enforcing payment of a revenue assessment sanctioned by Government, did not, *per se*, preclude the jurisdiction of the Court to entertain the suit. There no doubt may be acts done by the Government through its executive officers, which, though not contrary to any existing law, may be regarded as grievances; and undoubtedly acts that could not be considered as contrary to any existing right acquired under the laws administered by the Municipal Courts, would afford no cause of suit, and a plaint in which such an act appeared to be the only subject matter of complaint would properly be rejected *in limine* ..... But in the present case the plaintiff sets up that she possesses a legal proprietary right in the land entitling her to the supply of water free of the assessment—a claim of legal exemption—and seeks to recover in respect of an act done in violation of such legal rights, as also of the Revenue rules in force, and, until altered, binding upon the defendant; and we think the question in this, as in other suits of a civil

(1) 2 Mad. H. C. Rep., 167.

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nature, is whether the cognizance of the suit was barred by any Act or Regulation in force when the suit was brought."

I would affirm the Subordinate Judge's decree, declaring that the land in dispute was included in the area of the plaintiffs' villages, for which a permanent settlement was made, and is not liable to further assessment for revenue; and I would dismiss the appeal with costs.

MAHMOOD, J., concurred.

Appeal dismissed.

1884. *November* 13.

Before Mr Justice Oldfield and Mr. Justice Mahmood.

GANGA RAM (PLAINTIFF) *v.* BENI RAM AND OTHERS (DEFENDANTS).*

Jurisdiction of Civil Court—Landholder and tenant—Suit for recovery of land of which tenant has been dispossessed—Relation of landlord and tenant admitted —Act XII of 1881 (*N.-W. P. Rent Act*), *s* 95(*n*).

A landholder served a notice of ejectment on *G*, under the provisions of s. 36 of the Rent Act (N.-W. P.), as a tenant-at-will. Under the provisions of s 39 of the Act *G* contested his liability to be ejected, on the ground that he was not a tenant-at-will, but one holding by virtue of an agreement executed in his favour by the landholder. The question of *G's* liability to be ejected was decided adversely to him, and he was ejected under s. 40 of the Act. He subsequently sued the landholder in the Civil Court for possession of the land, by virtue of the agreement, alleging that his ejectment was a breach of such agreement The landholder's defence to this suit was that *G* had been rightfully ejected. *Held* that, inasmuch as the relation of landlord and tenant between the parties at the time of the proceedings under the Rent Act was admitted, and the dispute in the suit could appropriately form the subject of an application under cl. (*n*) of s. 95 of that Act, the suit was not cognizable in the Civil Courts.

Muhammad Abu Jafar v. *Wali Muhammad* (1); *Sukhdaik Misr* v. *Karim Chaudhri* (2); *Kanahia* v. *Ram Kishen* (3); distinguished. *Shimbhu Narain Singh* v. *Bachcha* (4) referred to.

THE suit in which this second appeal arose was instituted in the Court of the Munsif of Agra. It appeared that in February, 1882, the defendants, who were the zamindars of the village in which the plaintiff cultivated certain land, caused a notice of ejectment to be served on the latter under the provisions of s 36 of Act

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* Second Appeal No. 1744 of 1883, from a decree of Babu Promoda Charan Banerji, Subordinate Judge of Agra, dated the 11th September, 1883, affirming a decree of Maulvi Muhammad Fida Husain, Munsif of Agra, dated the 28th February, 1883.

(1) I. L. R., 3 All, 81.
(2) I. L. R., 3 All., 521.
(3) I. L. R, 2 All 429.
(4) I. L. R, 2 All 200.

XII of 1881 (N.-W. P. Rent Act). They alleged that the plaintiff was the tenant-at-will of the land. The plaintiff, under the provisions of s. 39 of that Act, contested his liability to ejectment, on the ground that by an agreement in writing between him and the defendants, called a "*patta*" (lease), dated the 13th November, 1881, and attested before the kanungo, his rent had been enhanced, and it had been agreed that, so long as he paid the enhanced rent, he should not be ejected. The Assistant Collector who heard the case decided that the plaintiff was liable to ejectment, and on the 5th June, 1882, the plaintiff was ejected under the provisions of the Rent Act. In the present suit the plaintiff claimed to recover possession of the land, by virtue of the agreement, dated the 13th November, 1881. The defendants defended the suit upon the grounds, among others, that it was not cognizable in the Civil Courts, and that the instrument of the 13th November, 1881, was not admissible in evidence, not having been registered under the Registration Act, 1877. The Court of first instance framed issues on these points, and disposed of the suit with reference to its decision on the second point. It held on this point that the instrument of the 13th November, 1881, was a lease, and therefore an instrument which was compulsorily registrable, and not being registered was not admissible in evidence. It therefore dismissed the suit. On appeal the plaintiff contended that the instrument of the 13th November, 1881, was not a lease, but merely an agreement of the kind mentioned in ss. 12 and 21 of the Rent Act, and therefore not compulsorily registrable. The lower appellate Court (Subordinate Judge) held, on the question of jurisdiction, that the suit was cognizable in the Civil Courts. It observed as follows:—" I am of opinion that the suit is cognizable in the Civil Courts. The Revenue Court has jurisdiction when the relationship of landlord and tenant is admitted to exist between the parties. In this case the defendants deny that the plaintiff is a tenant. He has been ejected by the Revenue Court, and it has been declared that he has no right to retain possession of the land in suit. He is therefore competent to sue in the Civil Courts for a declaration that he is still the tenant of the defendants, and that he has the right to occupy his holding in perpetuity so long as he pays his rent. The Civil Court alone can make such a declaration. Of course, if it

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be found that the plaintiff is the tenant of the defendants and is entitled to remain in possession of his holding, it will abstain from giving a decree for possession, with reference to the provisions of s. 95 of the Rent Act, leaving the plaintiff to seek his remedy under clause (*n*) of that section. This view is supported by *Muhammad Abu Jafar* v. *Wali Muhammad* (1) and *Sukhdaik Misr* v. *Karim Chaudhri* (2), and *Ram Prasad* v. *Ram Shankar* (3). The decision of the Revenue Court between these parties cannot moreover operate as *res judicata*." On the question whether the instrument of the 13th November, 1881, was compulsorily registrable, the lower appellate Court agreed with the Court of first instance in holding that the instrument was a lease; and as such compulsorily registrable under the Registration Act, 1877, and that it was not receivable in evidence, not being registered.

In second appeal the plaintiff contended, *inter alia*, that the instrument on which his suit was based was not a lease, and consequently was not compulsorily registrable under the Registration Act.

Mr. *J. D. Gordon*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*) and Pandit *Bishambhar Nath*, for the respondents.

The Court (MAHMOOD and OLDFIELD, JJ.) delivered the following judgment:—

MAHMOOD, J.—We consider it unnecessary to enter into the various points raised by the argument of the learned counsel for the appellant, because we are of opinion that the suit was not cognizable by the Civil Court. That the relation between the parties was that of landlord and tenant is admitted on all hands, and the plaintiff's case, even if fully admitted, amounts to a contention that by reason of the *patta* of 13th November, 1881, his tenancy-at-will was converted into a perpetual tenancy at the fixed annual rent of Rs. 79, and that, in breach of the conditions of the *patta*, the defendants ejected him on the 5th June, 1882. On the other hand, the defendants, whilst denying the execution of the *patta*, did not deny that at the time of his ejectment the plaintiff was their tenant, and

(1) I. L. R., 3 All., 81. (2) I. L. R., 3 Al., 521.
(3) Weekly Notes, 1882, p. 58.

the substantial part of the defence amounted to the contention that his ejectment was not wrongful. Neither party asserted any rights which are inconsistent with or go beyond the relation of landlord and tenant, and the dispute thus raised could therefore appropriately form the subject-matter of an "application for the recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed," within the meaning of cl. (*n*), s. 95 of the Rent Act (XII of 1881), which must therefore be understood to oust the jurisdiction of the Civil Court in this case. The rulings on which the learned Subordinate Judge has relied for the contrary opinion are not applicable to the present case. In *Muhammad Abu Jafar* v. *Wali Muhammad* (1) the defendants distinctly asserted a right in themselves which would be wholly inconsistent with the relation of landlord and tenant, whilst in *Sukhdaik Misr* v. *Karim Chaudhri* (2) the plaintiff distinctly stated that the defendants were simple trespassers wrongfully retaining possession after the expiration of the lease, and similar was the case in *Kanahia* v. *Ram Kishen* (3). The learned Subordinate Judge has held that the relation of landlord and tenant does not exist between the parties in the present case, because, by reason of the ejectment of 5th June, 1882, the plaintiff ceased to be a tenant of the defendants, but that ejectment is stated to be the cause of action for this suit, and the relation of landlord and tenant being admitted to have existed between the parties at that time, the plaintiff's complaint amounts to a claim such as would form the matter of an application under cl. (*n*), s. 95 of the Rent Act. This view of the law is not inconsistent with the *ratio decidendi* of either of the two contrary opinions expressed by the learned Judges in the Full Bench case of *Shimbhu Narain Singh* v. *Bachcha* (4). In the present case, however, it appears that the relation of landlord and tenant being admitted to have existed at the time, the defendants, as landholders, applied according to law to eject the plaintiff by service of notice, and the plaintiff's objections to ejectment being overruled by the Revenue Court, he was ejected from the holding. The matter was one exclusively within the jurisdiction of the Revenue Court, and since in the present case the pleadings of the parties do not raise any question of title

(1) I. L. R., 3 All. 81.
(2) I. L. R., 3 All. 521.
(3) I. L. R., 2 All., 429.
(4) I. L. R., 2 All., 200.

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such as would be inconsistent with, or in excess of, the relation of landlord and tenant, the suit was not cognizable by the Civil Court.

For these reasons we uphold the decrees of the lower Courts dismissing the suit, and dismiss this appeal with costs.

Appeal dismissed.

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FULL BENCH.

Before Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

GODHA AND ANOTHER (PLAINTIFFS) *v.* NAIK RAM AND ANOTHER (DEFENDANTS).*

Suit for personal property—Suit to establish right—Small Cause Court suit—Civil Procedure Code, s. 283—*Act XI of* 1865, *s.* 6.

A person, who had claimed moveable property attached in execution of a decree as his own, and whose claim had been investigated and disallowed under ss. 278 to 281 of the Civil Procedure Code, sued, the property being under attachment, the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value. *Held* that the suit could not properly be regarded as a suit "for personal property or for the value of such property," within the meaning of s. 6 of Act XI of 1865, but must be regarded as a suit to establish the plaintiff's right, in the sense of s. 283 of the Civil Procedure Code, inasmuch as the plaintiff could not recover the property without clearing out of his way the order of attachment, which he could only do by establishing his right in the sense of s. 283, and therefore the suit was not one cognizable in a Court of Small Causes.

Janakiammal v. *Vithenadien* (1), *Kundeme Naine Booche Naidoo* v. *Ravoo Lutchmeepaty Naidoo* (2), *Gordhan Pema* v. *Kasandas Balmukundas* (3), *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram* (4), *Balkrishna* v. *Kisansing* (5), and *Radha Kishen* v. *Chotey Lal* (6) dissented from.

THIS was a reference by Babu Promoda Charan Banarji, Judge of the Court of Small Causes at Agra, under s. 617 of the Civil Procedure Code. The question of law referred was "whether a suit under s. 283 of the Civil Procedure Code, for establishment of right to, and recovery of, moveable property, by an unsuccessful claimant, is cognizable by a Court of Small Causes, where the value of the property is within the pecuniary limit of the jurisdiction of such Court." The facts which gave rise to the reference were

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* Reference under s. 617 of the Code of Civil Procedure, by Babu Promoda Charan Banarji, Judge of the Court of Small Causes at Agra, dated the 15th May, 1883.

(1) 5 Mad. H. C. Rep., 191.
(2) 8 Mad. H. C. Rep, 36.
(3) I. L. R., 3 Bom., 179.
(4) I. L. R., 4 Bom., 503.
(5) I. L. R., 4 Bom., 505.
(6) N.-W. P. H. C. Rep., 1871, p. 155.

these:—Naik Ram, who held a decree for money against Murli Singh, caused certain crops to be attached in execution of that decree. Godha and Bidha objected to the attachment, claiming the crops as their own. The Court executing the decree, under ss. 278-281 of the Civil Procedure Code, disallowed the objection. Thereupon Godha and Bidha brought the suit in which this reference was made, in the Court of Small Causes at Agra, against Naik Ram, the decree-holder, and Murli Singh, his judgment-debtor. They prayed that the crops might be declared to belong to them, and might be delivered to them, or they might be awarded Rs. 200 as their value, in case the crops could not be delivered to them. The Judge of the Small Cause Court, being doubtful whether the suit was cognizable in a Court of Small Causes, made the present reference to the High Court. The reference came before a Full Bench for disposal.

The plaintiffs did not appear.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the defendant Naik Ram.

The following judgment was delivered by the Full Bench:—

STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—The question submitted to us by the Division Bench arises as follows:—The plaintiffs allege that certain crops cultivated by them, worth Rs. 200, were caused to be attached by Naik Ram, defendant, as the property of his judgment-debtor, Murli Singh, defendant, under an order of the Subordinate Judge of Agra, and that they objected to such attachment under s. 278 of the Civil Procedure Code, but such objection was rejected on the 13th June, 1882. They therefore pray "that the produce or crop specified hereafter be declared to be the plaintiffs' property, and be delivered to them; and in case of this prayer being impracticable, Rs. 200, value thereof, may be awarded to the plaintiffs against the defendants."

The point for our determination is, whether such a suit is to be regarded as one "for personal property or for the value of such property," within the meaning of s. 6 of Act XI of 1865, and, as such, exclusively cognizable by a Small Cause Court. We may premise by observing that it must now be taken as settled law that a suit by a decree-holder to have the right of his judgment-debtor

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declared to property, attachment of which has been raised, cannot be determined by a Small Cause Court—*Ram Dhun Biswas* v. *Kefal Biswas* (1), a decision of Sir Barnes Peacock, is the leading authority upon this point—and the same view was expressed in *Ram Gopal* v. *Ram Gopal* (2). On the other hand, a suit by the owner of property which has been attached, after disallowance of his objection to the attachment, either against the decree-holder or an auction-purchaser, to recover such property, seems to have been generally held to be exclusively cognizable by a Small Cause Court, as the following authorities show. In the case of *Woomesh Chunder Bose* v. *Muddun Mohun Sircar* (3), the plaintiff sued to recover bricks under these circumstances. So in *Shiboo Narain Singh* v. *Muddun Ally* (4), Garth, C. J., and McDonell, J., held that where goods had been illegally seized and sold in execution, a suit by the owner thereof against the purchaser for the goods or their value will lie in a Small Cause Court, if the value of the goods is within the amount for which that Court has jurisdiction. In the course of the judgment, Garth, C. J., remarked :—"A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings He may follow them into the hands of the purchaser or any other person, and sue for them or their value without reference to anything which has taken place in the execution-proceedings, except that, under art. 11 of the Limitation Act, he must bring his suit within a year from the time when the adverse order in the execution-proceedings was made." The learned Chief Justice further ruled that "if the plaintiff makes the decree-holder and judgment-debtor parties to the suit, and requires a declaration of his right to the property, such a suit will not lie in the Small Cause Court."

This decision appears to have been followed in *Akbar Ali* v. *Jezuddin* (5) by Garth, C. J., and Pontifex, J., the former remarking: "A man whose goods have been taken and sold in execution has a right to bring a suit in the Small Cause Court for the recovery of those goods against any one into whose hands they have come ..... Sections 280 and 281 of the Civil Procedure Code relate only to

(1) 10 W. R., 141.
(2) 9 W. R., 136.
(3) 2 W. R., 44.
(4) I L R., 7 Calc., 608.
(5) I. L. R., 8 Calc., 399.

execution-proceedings, and have no application to a substantive suit, which is brought to establish a mere right. But in this case, although the plaintiff asks in form for a declaration of his right, he is really suing, not for a declaratory decree, but to recover possession, &c." There are two Madras cases, one *Janakiammal* v. *Vithenadien* (1), in which Scotland, C. J., and Innes, J., held that, where the property of *N* having been attached, and the plaintiff (his wife) having objected to such attachment, and her objection being disallowed, her suit, before sale could take place, for removal of the attachment and recovery of the property, was cognizable by the Small Cause Court; and the other, *Kundeme Naine Booche Naidoo* v. *Ravoo Lutchmeepaty Naidoo* (2), in which Morgan, C. J., and Kindersley, J., took a similar view. The Bombay cases are also important. In *Nathu Ganesh* v. *Kalidas Umed* (3) the plaintiff was the owner of property attached in execution of decree, whose objection had been rejected under s. 246 of Act VIII of 1859, and he sued the decree-holder for possession thereof. Westropp, C. J., after examining the authorities, observes:—"We do not think that the concluding passage in s. 246 of Act VIII of 1859, which leaves it open to a party against whom an order upon an application under that section has been made, to bring a suit to establish his right at any time within one year from the date of the order, prevents a tribunal, before which such a party might have brought his suit, if there had not been any application made under that section, from entertaining it. Whenever a person sues to recover property alleged to have been wrongfully taken from him, he sues to establish his right to it, and if he did not so establish his right, he could not recover it *in specie* or compensation by way of damages for it. Whether the new Civil Procedure Code (Act X of 1877) allows such a suit as the present, by an alleged owner, to be brought in a Court of Small Causes, it will be time enough to say when the question arises." In *Gordhan Pema* v. *Kasandas Balmukundas* (4) Melvill and Kemball, JJ., held, in advertence to ss. 283 and 57 (*a*) of Act X of 1877, that a suit by a defeated claimant to establish his right to, and for possession of, attached moveable property, against the decree-holder, must be instituted in a Small Cause Court, and the accuracy of this

(1) 5 Mad. H. C. Rep., 191.
(2) 8 Mad. H. C. Rep., 36.
(3) I. L. R., 2 Bom., 365.
(4) I. L. R., 3 Bom., 179.

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ruling was recognised in *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram* (1) by Melvill and Pinhey, JJ. "The reason for that decision was," they remark, "that a suit, by the owner, for the recovery of attached property may properly be regarded as a suit 'for personal property.' But a suit by a decree-holder to establish his right to attach and sell certain property, as belonging to his judgment-debtor, cannot be called a suit for personal property." This decision was followed in *Balkrishna* v. *Kisansing* (2) (Melvill and Kemball, JJ.). In this Court, in the case of *Balmokund* v. *Lekhraj* (3), the plaintiff sued to set aside an order in execution under s. 246 of Act VIII of 1859, releasing a boat from attachment, and to obtain its sale in execution as the property of one Buljeeta, judgment-debtor of the plaintiff. The defendant Lekhraj was an auction-purchaser at a sale in execution of another decree against Baljeeta. The Full Bench held that such a suit was not cognizable by a Court of Small Causes; but incidentally, in reference to the case of *Ram Dhun Biswas* v. *Kefal Biswas* (4), it was remarked:—"The effect of that decision is, that a decree-holder cannot, in order to obtain satisfaction of his decree, sue in the Small Cause Court to establish his judgment-debtor's title to property seized in execution and afterwards released. Had the plaintiff there himself possessed any right of property in the goods, and had the suit been brought to vindicate that right, the decision might have been different. Such a suit to establish right and to obtain relief either by recovery of the property or of damages, appears to be cognizable by a Small Cause Court." This latter expression of opinion, which would seem to be a mere "*obiter dictum*," was treated by Turner and Turnbull, JJ., in *Radha Kishen* v. *Chotey Lall* (5), as an authoritative ruling that "a suit brought by an owner to recover moveable property, of which he has been dispossessed by an attachment order, may, when the value is less than Rs. 50), be maintained in a Court of Small Causes, it being a suit for personal property."

In *Makund Lall* v. *Nasiruddin* (6), the plaintiff, alleging himself to be the owner of a cart, his objection to the attachment of which had been disallowed, sued the decree-holder, who had

(1) I. L. R., 4 Bom., 503.
(2) I. L. R., 4 Bom., 505.
(3) N.-W. P. H. C. Rep., 1871, p. 156.
(4) 10 W. R., 141.
(5) N.-W. P. H. C. Rep., 1871, p. 155.
(6) Weekly Notes, 1882, p. 93.

attached it as the property of one Nabi Bakhsh, his judgment-debtor, for recovery thereof and damages, and to set aside the order disallowing his objections to the attachment. Straight and Brodhurst, JJ., held that "as the suit was not for personal property, pure and simple, as mentioned in s. 6 of Act XI of 1865, but the further relief was prayed that the order in execution disallowing the plaintiff's objections in respect of the property might be set aside, the suit was not cognizable in a Court of Small Causes."

The latest case is that of *Elliax* v. *Sita* (1), of which the Subordinate Judge speaks in his referring order. There the plaintiffs claimed, as owners, certain attached property, after their objection to its attachment had been disallowed. Oldfield and Brodhurst, JJ, observed that the suit was one "brought, with reference to the provisions of s. 283 of the Civil Procedure Code, to have a right declared in property under attachment by a Civil Court, and for its recovery by removal of attachment. It is not, in our opinion, a suit cognizable by a Court of Small Causes." This completes the authorities bearing upon the question before us, and, summarising the effect of them, it would seem that the Calcutta and Bombay Courts hold that, not only under s. 246 of Act VIII of 1859, but under s. 283 of Act XIV of 1882, a suit by the owner of moveable property, wrongly attached in execution of decree, to recover the same from a purchaser, after disallowance of his objection to the attachment, lies in the Small Cause Court. The Bombay and Madras rulings appear to go further, and to hold that such a suit may be maintained in the Small Cause Court against the decree holder, while the goods are under attachment, though the decisions of the latter Court are confined to Act VIII of 1859; and this seems to be the view of Turner and Turnbull, JJ., in the case already mentioned. Both Garth, C. J., and Westropp, J., lay down that the owner of goods does not lose his title to them because they have been illegally attached or sold, and his objection to their attachment has been disallowed. It must be remembered that the latter's remarks, however, were specifically limited to s. 246 of Act VIII of 1859, and he in terms declined to express any opinion in reference to the language of s. 283 of the present Civil Code.

(1) Weekly Notes, 1883, p. 115.

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It is after all no more than a truism to say that every person who goes into a Small Cause Court to sue for personal property or its value, must, in order to succeed, establish his right to, that is to say his ownership of, such property. The difficulty in dealing with the question referred to us is to understand how, having regard to the language of ss. 280, 281, 282 and 283 of the Procedure Code, and art. 11 of the Limitation Law, a suit against a decree-holder, while attachment is subsisting, if it is to have any practical effect, can be regarded as other than one to establish the right mentioned in s. 283. In *Shiboo Narain Singh* v. *Muddun Ally* (1) Garth, C. J., intimates that, "if a suit by an owner is brought against a purchaser in the Small Cause Court, it must be instituted within a year from the time when the adverse order in the execution-proceedings was made."

We confess our inability to reconcile this passage in his judgment with what immediately precedes it, namely, that the suit may be brought "without reference to anything which has taken place in the execution-proceedings." It seems to us that, if art. 11 of Act XV of 1877 supplies the limitation, such a suit must be considered as for "the establishment of right to, or the present possession of," property in respect of which an order has been passed under ss. 280, 281 or 282. But if it is to be treated as a suit for personal property, pure and simple, against the purchaser, irrespective of anything that may have happened in execution, then surely the limitation to be applied to it should be that provided in art. 48. It must be conceded that the order passed under s. 283 is only conclusive as between the parties to the proceeding under ss. 280, 281, 282, and for the purpose of answering this reference it is not necessary to discuss how far, when unreversed by a suit, it confers, through a subsequent auction-sale, a good title on a purchaser. However this may be, in the case before us, the property is still under attachment, and the decree-holder and the judgment-debtor, between whom and the plaintiffs an order conclusive of the right to the property, subject to a suit, has been passed in execution, are the defendants. It is impossible for the plaintiffs to reach the property, without clearing out of their way the order of attachment, which is still subsisting, and

(1) I. L. R., 7 Calc., 608.

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this they can only do by establishing their right in the sense of s. 283. We do not think such a suit is cognizable by a Small Cause Court, or that it can be properly regarded as simply one for "personal property" or its value. Were we so to hold, the result must follow that a decree of a Small Cause Court could override orders in execution of the ordinary Civil Courts passed under ss. 280, 281 and 282—a form of procedure that could not but be most inconvenient. In expressing the above view, we regret to have formed a different opinion to that of the Courts of Madras and Bombay, though it does not appear to be in conflict with the Calcutta rulings to which we have referred. The reference may be answered as indicated above.

APPELLATE CIVIL.

1884 *November* 1.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

CHUNNI LAL (PLAINTIFF) *v.* CHAMMAN LAL (DEFENDANT).*

Civil Procedure Code, ss. 108, 136—*Decree against defendant under s.* 136—"*Ex-parte*" *decree.*

A defendant failing to comply with an order to answer interrogatories, the Court, under s. 136 of the Civil Procedure Code, struck out his defence, and, proceeding *ex-parte*, passed a decree against him. *Held* that the decree could not be treated, in respect of the remedy by appeal, as an *ex-parte* decree, and therefore, under the ruling in *Lal Singh* v. *Kunjan* (1), not appealable, but that an appeal would lie from the decree.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Sital Prasad* and Munshi *Hanuman Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The plaintiff instituted this suit in the Court of the Munsif of Etáwah, and the defendant was called upon by the Munsif to answer certain interrogatories, and, having failed to comply with the order, the Munsif proceeded, under s. 136, Civil Proce-

* First Appeal No. 51 of 1884, from an order of Maulvi Muhammad Basit Khan, Subordinate Judge of Mainpuri, dated the 5th May, 1884.

(1) I. L. R., 4 All., 387.

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dure Code, to strike out his defence, and disposed of the suit as if he had not appeared and answered.

The defendant appealed in the Subordinate Judge's Court, and the Subordinate Judge has set aside the decree, and remanded the suit for fresh trial.

The plea in appeal before us is that there is no appeal, inasmuch as the decree of the Munsif must be treated as an *ex-parte* decree. It is true that the majority of this Court (Oldfield and Brodhurst, JJ., dissenting) have held that no appeal will lie from an *ex-parte* decree—*Lal Singh* v. *Kunjan* (1). We are of opinion, however, that a decree made in a suit, where the provisions of s. 136 of the Civil Procedure Code have been put in force, cannot be treated as an *ex-parte* decree in respect of the remedy by appeal. In the first place, as a matter of fact, the defendant did appear to answer to the suit, and, therefore, there was no *ex-parte* decree in the strict sense of the word; and next, unless allowed an appeal, he would have no remedy, for the remedy by application to the Court that makes an *ex-parte* decree under s. 108 is inapplicable to a case dealt with under s. 136, as the terms of s. 108 show. Under that section, a defendant, in order to succeed, has to satisfy the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. It contemplates cases of *ex-parte* proceedings strictly and properly so, and not such as are made under s. 136. We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1884 *November* 14.

Before Sir W. Comer Petheram, Kt, Chief Justice, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* KALLU AND ANOTHER.

Criminal Procedure Code, s. 338—Tender of pardon to accomplice who has pleaded guilty—Accomplice—Evidence—Corroboration—Practice Accused not defended —Court to test statements of witnesses for prosecution.

A Court of Session, under s. 338 of the Criminal Procedure Code, tendered a pardon to an accused person, charged jointly with two others for the same offence, who had pleaded guilty. The tender was accepted, and such person was examined as a witness against the other accused *Held* that the tender of pardon was not improperly made, and the evidence of the approver was admissible.

(1) I. L R., 4 All., 387.

Per DUTHOIT, J.—The word "supposed" in s. 338 must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man, who, although admitted to be a party to the crime, is unconvicted.

Per PETHERAM, C.J —Where an accused person is not defended, the Court should, in the interests of justice, test the statements of the witnesses for the prosecution, by questions in the nature of cross-examination.

THIS was an appeal from convictions by Mr. R. S. Aikman, Offg. Sessions Judge of Aligarh, dated the 2nd August, 1884. The appeal came for hearing before Duthoit, J., who directed that the case should be laid before a Divisional Bench. The case accordingly came for hearing before Petheram, C.J., and Duthoit, J. It appeared that the appellants, Kallu and Dungar, together with one Loka, were charged before the Sessions Judge, under s. 397 of the Penal Code, with dacoity with attempt to cause death or grievous hurt. The accused Loka was further charged, under s. 412, with dishonestly receiving property stolen in the commission of a dacoity. When the charges had been read, Loka pleaded guilty to the charge under s. 397, but claimed to be tried on the charge under s. 412. The other accused pleaded not guilty. At the beginning of the trial the Sessions Judge, on the application of the Government Pleader on behalf of the Crown, exercised the powers given to the Court by s. 338 of the Criminal Procedure Code, tendered a pardon to Loka, and admitted his evidence as that of an approver against the other accused. In the result the Sessions Judge was of opinion that the evidence given by Loka was sufficiently corroborated, and he accordingly convicted both Kallu and Dungar, and sentenced them to be rigorously imprisoned for seven and four years respectively.

In this appeal by Kallu and Dungar the first contention raised on their behalf had reference to the terms of s. 338 of the Criminal Procedure Code, and it was to the effect that no pardon should have been tendered to Loka, nor should he have been accepted as an approver, since he was not merely "supposed" to have been concerned in the offence, but known, on his own admission, to have been concerned in it. The second ground of appeal was, that the testimony of Loka was not sufficiently corroborated by independent evidence to justify the convictions.

Mr. *A. Carapiet*, for the appellants.

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The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The Court delivered the following judgments :—

PETHERAM, C. J.—In this case I think that the convictions and the sentences must be affirmed. The question depends really upon the value of the evidence. The evidence which is material for the whole story was the evidence of the approver. Now the practice, no doubt, of the Courts is, where the evidence of an approver stands alone, to treat it as not of sufficient value to make it safe for the Courts to act upon it, because the man who gives the evidence comes before the Court, practically with the statement :—"I have so little sense of justice that I do not object to commit a crime;" and consequently his testimony cannot be taken as of sufficient value to subject a man to punishment. That, however, does not affect the fact that his evidence is admissible. The story told must be looked to, to see whether it hangs together or not. The story told here is a categorical story, which bears the semblance of truth on the face of it. I think that Magistrates who conduct these inquiries would be wise if they would test the accuracy of such statements by cross-examination themselves. Where the prisoner is not defended, the Magistrate and the Judge himself ought, in the interests of justice, to test the accuracy of the statements made by witnesses, by questions in the nature of cross-examination, and, if that were done with care, I think myself that the result of these inquiries would be more satisfactory. At all events, the evidence of the approver does not appear to have been shaken by cross-examination, and the question is whether independent evidence has been given in this case which corroborates his evidence.

[His Lordship then examined the other evidence in the case, and was of opinion that it sufficiently corroborated the evidence of the approver, and that the appeal should be dismissed.]

DUTHOIT, J.—The first point raised in this appeal is whether the Judge was right in tendering a pardon to Loka. The second point is whether the conviction of the appellants upon the evidence given by Loka is good and can be sustained or not. As regards the first point, I think that there was no irregularity in the tender of a pardon to Loka. It is urged with reference to s. 338 of the Cri-

minal Procedure Code, that Loka should not have been made an approver, because he was not only "supposed" to have been concerned in the crime, but was, on his own showing, actually concerned in it, and liable to conviction upon his plea of guilty. But I think that the words in question must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man like Loka, who, although admitted to be a party to the crime, is unconvicted. I hold, therefore, that the evidence of the approver was rightly taken. Under s. 133 of the Evidence Act a conviction is not illegal simply because it proceeds upon the uncorroborated testimony of an accomplice. Of course, such evidence must be received with great caution, and it has been our practice to require corroboration of such evidence.

[The learned Judge then considered the corroboration in this case, and concurred with the Chief Justice in accepting it as sufficient.]

Convictions affirmed.

APPELLATE CIVIL.

1884 *November* 18.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

KALIAN SINGH AND ANOTHER (DEFENDANTS) *v.* SANWAL SINGH (PLAINTIFF). *

Declaratory decree—Cause of action—Hindu widow—Testamentary declaration.

A sonless Hindu widow, in possession of her deceased husband's estate as such, made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that *S*, the person entitled to succeed her, had no right to the property. *Held* that such statement, as it was intended to operate, and would have operated, as a will in respect of the property, gave *S* a right to sue for a declaration that it should not have any effect as against him.

One Tondi Singh, a Hindu, governed by the law of the Mitakshara, died without leaving any issue, but leaving a widow named Jamna Kuar. The latter succeeded to certain zemindari shares comprising the separate property of her deceased husband. On the 6th January, 1883, at or about the time this succession was recorded in the revenue register, Jamna Kuar [illegible] following deposition:—

* First Appeal No. 17 of 1884, from a decree of A. F. Millett Esq., District Judge of Shâhjahanpur, dated the 17th September, 1883.

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"I am the married wife of Tondi Singh. All the zamindari belonging to my husband is recorded in my name. I wish that, after my death, the property left by my deceased husband be given to my nephew, Kalian Singh. Bhikam Singh and Sanwal Singh have no right in the property, and they should not get anything in it. This property was acquired by Ganjan Singh, my grandfather-in-law, who was grandfather of Tondi Singh. It was not acquired by Taj Singh, the common ancestor. [In reply to Bhikam Singh's question, witness stated] My grandfather-in-law and Bhikam Singh's grandfather were brothers; but the property was not acquired by Taj Singh. My father-in-law sold 8 biswas of the claimant's property which is with Bhikam Singh. My husband brought up Kalian Singh from the age of three years, and made him *malik* (proprietor)."

The plaintiff in this suit, Sanwal Singh, who was the person entitled under the Mitakshara law to succeed to the property of Tondi Singh on the death of his widow, brought the present suit against Jamna Kuar and Kalian Singh, to have the statements contained in her deposition declared as of no effect against him. The relief sought by him was thus stated in his plaint:—

"That the statement made by defendant No. 1 (Jamna Kuar) on the 6th January, 1883, as her last testament, to the effect that the plaintiff has no right, but that defendant No. 2 (Kalian Singh) will become the owner in future, may be declared null and void, as against the plaintiff, after the Musammat's death."

The defence set up by the defendant Jamna Kuar raised two questions, namely: (i) whether the plaintiff had a cause of action, and (ii) if he had, whether the suit was one in which a declaratory decree should be given. Upon these questions the Court of first instance (District Judge of Sháhjahánpur) observed as follows:—

"Assuming the statement which has led to this suit not to partake of a testamentary character, it is [illegible], in my opinion, sufficient basis for the suit. [illegible] been seen that a denial of title is [illegible] can be no question that the statement in question was a very clear and positive denial of the plaintiff's right. The circumstances under which it was made gave it formality. It not only, moreover, denied the plaintiff's right, but in plain terms

asserted the right of another person. Under these circumstances I am disposed to think that, even if the statement of defendant No. 1 do not amount to a will, there is sufficient in it, so far as its contents have to be studied, to see whether the suit is maintainable.

"It may be open to question, however, whether the plaint should not be regarded as resting upon the alleged testamentary character of the statement, and it will be better therefore to notice the fourth and fifth of the points above enumerated. It will not be necessary to do so at any length. The validity of a will or the observance of the requisite formalities in its execution do not necessarily affect the question whether a suit challenging its force as against any person is maintainable; the former may be of importance in the defence, if the defence be that the will is valid; the latter may not be immaterial, if the defence be, as it is here, an attempt to divest the document of its testamentary character (as tending to show the document was not intended and could not be considered to possess that character, but it does not appear to me necessary to determine those points for the purpose of deciding whether the suit is maintainable. If the statement is of such a nature that there are reasonable grounds for the apprehension that it was intended as a will, or that it might be regarded as one, I think the plaintiff has sufficient justification for seeking a declaration that the statement has not, as a will, any testamentary force as against him, and if he shows that the statement furnishes such reasonable grounds, he sufficiently establishes the allegation in the plaint, the only point now under consideration.

"That there are such grounds plaintiff shows by the authorities he quotes. The first of these is Mayne's Hindu Law, 3rd ed, s. 3 7, and it is there pointed out that petitions to officials or answers to official inquiries have been held to amount to a will. This, moreover, does not rest only on Mr. Mayne's own view of the law, but on important rulings of the Privy Council (1). All that defendants can urge is the invalidity of the will, and the absence of various features said to be necessary to a will, and I do not think these suffice to prevent apprehension of the purpose for which the statement was intended or might be used.

(1) *Mahomed Shumsool Hooda* v. *Shewukram*, L. R, 2 Ind. Ap. 7; *Hurpurshad* v. *Sheo Dyal*, L. R., 3 Ind Ap. 259.

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"I think, then, that even if it was necessary for plaintiff to make good the allegation in this plaint in order to render the suit maintainable, he does sufficiently establish the allegation, and the suit is maintainable.

For the above reasons I find that the suit is maintainable, and the first issue is thus decided in favour of plaintiff.

The second issue is, whether the suit is one in which a declaratory decree may properly be granted to the plaintiff.

The only objection raised in the pleadings is that the plaintiff is older than defendant, and thus the reasonable presumption is that the plaintiff will die before defendant No. 1. It is with regard to this argued that declaratory suits should only be allowed when difficulty would arise on the widow's death, and *Chottoo Misser* v. *Jemah Misser* (I. L. R., 6 Calc. 198) and *Hansbutti Kerain* v. *Ishri Dutt Koer* (I. L. R., 5 Calc. 512) are cited in support of the view. The first of these is to the effect that unless such suits were permitted, it might be impossible to bring evidence at the time of the widow's death to prove there was no necessity for alienations, and it would be impossible to prevent the widow from committing irremediable mischief to the estate. The second holds that the Court will not decide, in a declaratory suit, intricate questions of law, where, possibly, no effect may be given to its decision, and certainly no immediate effect can be, and when the postponement of the decision to a more appropriate time will not prejudice the plaintiff. To this may be added what I have above quoted from the statement of objects and reasons for Act I. of 1877.

"Now in this case defendant No. 1 made a statement to the effect that she wished defendant No. 2 to be owner after her death, and this was the so-called testamentary part of the statement. Had this been all she said, I should have been disposed to hold that the validity of the so-called will might have equally well been inquired into at the death of defendant, if it took place half a century hence. But this was not the whole of her statement; she said that her wish was in accordance with the wish (*marzi*) of her husband, and she thus raised a question on which not improbably evidence might seen necessary, and that evidence would not be equally obtainable half a century hence. Defendant No. 1 further

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denied plaintiff's right without stating on what grounds she did so, and here again raised a question on which evidence might seem necessary. By these two latter parts of her statement she thus gave plaintiff reason and occasion to bring a suit at once, and I think the case is one in which a declaration might be properly asked for The fact that defendant now does not attempt to defend her statement is not a ground for not granting the declaration sought, nor, indeed, is it pleaded by defendant that it is."

On appeal by the defendants to the High Court, it was again contended that the statements contained in the deposition of Jamna Kuar gave the plaintiff no cause of action.

Mr. *A. Carapiet* and Babu *Barada Prasad*, for the appellants.

Babu *Ram Das Chakarbati*, for the respondent.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

OLDFIELD, J.—The statement made before and recorded by the Revenue Court was intended to operate, and would have operated, as a will in respect of the property, and it gave a valid cause of action to the plaintiff for bringing this suit.

We affirm the decree and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1884 *November* 19.

DURGA (DEFENDANT) *v.* HAIDAR ALI (PLAINTIFF).*

Pre-emption—Rival pre-emptor impleaded as defendant—Act XV of 1877 (*Limitation Act*), *sch* ii, *Nos.* 10 120—*Remand—Civil Procedure Code, ss.* 562, 564.

Two suits to enforce the right of pre-emption in respect of a particular sale having been instituted, the plaintiff in the one first instituted was added as a defendant to the other. *Held* that, as regards him, the second suit constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property, which was a claim essentially declaratory in its nature; and there being no specific provision for such a claim in the Limitation Act, it was governed by art. 120 of that Act, and the right to sue accrued when the first suit was instituted.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of the sale of a share in a village. The suit

* First Appeal No. 47 of 1884, from an order of W. Barry, Esq., District Judge of Bánda, dated the 14th April, 1884.

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was based on the *wajib-ul-arz* of the village. It appeared that on the 14th December, 1882, Nabi Bakhsh, defendant, executed and registered a deed of sale, whereby he conveyed his share in a village to Gayadin and Bhura, defendants. Durga, a co-sharer in the village, instituted a suit on the 4th December, 1883, to enforce the right of pre-emption in respect of that sale. During the pendency of that suit, Haidar Ali instituted the present suit on the 7th December, 1883, to enforce the right of pre-emption in respect of the same sale, and on the 21st December, 1883, he applied to add Durga as a defendant to his suit, on the ground of his having previously instituted a rival suit for pre-emption. Durga was accordingly impleaded, and a summons was served on him on the 30th of December, 1883.

Various pleas were set up in defence of Haidar Ali's suit, but it is not necessary for the purposes of this report to notice any of them, except the plea of limitation set up by the defendant Durga.

The Court of first instance tried the two suits together. It decreed the claim of Durga, but applying the provisions of the penultimate paragraph of s. 32 of the Civil Procedure Code and those of s. 22 of the Limitation Act and sch. ii, No. 10 of the same enactment, dismissed Haidar Ali's suit, both against Durga and the other defendants, as barred by limitation.

On appeal by Haidar Ali, the lower appellate Court held that his suit, so far as it claimed pre-emption against the vendor and the vendees, had an aspect different to his claim against Durga, the rival pre-emptor; that in its former aspect it was governed by one year's limitation under sch. ii, No. 10, of the Limitation Act; that in its other aspect it fell under No. 120 of the same enactment, being a claim for which no special period of limitation is provided in the Act; and that the entire suit was therefore within time.

On these findings the lower appellate Court set aside the decree of the Court of first instance in the suit of Haidar Ali, and remanded the case for disposal on the merits.

From that order the present appeal was preferred by Durga, and in his memorandum of appeal he contended that the suit, as against him, was barred by limitation, that even if it were not so barred, the lower appellate Court should, instead of remanding the case,

have disposed of it finally, there being on the record the entire evidence produced by the parties; and that the order as to costs was erroneous.

Munshi *Sukh Ram*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

MAHMOOD, J.—We are of opinion that the appeal, so far as it relates to the question of limitation, has no force. Haidar Ali's suit, so far as it claimed pre-emption in respect of the sale of 14th December, 1882, was properly instituted within a year after the sale, and the vendor and the vendees, necessary parties to such a suit, were duly impleaded.

The suit was governed by art. 10 of the Limitation Act, and was obviously within time. So far as the position of Durga, appellant, is concerned, it is true that he was impleaded as defendant to the suit after the lapse of one year from the date of the sale. But the claim against him is not of the nature contemplated by art. 10 of the Limitation Act. He was impleaded, not because he was a party to the sale in respect of which pre-emption was sought to be enforced, but because he had, by instituting a rival suit for pre-emption, rendered it necessary for the plaintiff Haidar Ali to pray in his suit for the declaration that he had a right of pre-emption preferential to that of the defendant Durga. Such a claim cannot be regarded as a claim for pre-emption, but a claim to establish a right to pre-empt the property in preference to a rival pre-emptor. In other words, the suit, so far as it relates to Durga, constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property. The claim was essentially declaratory in its nature, and there being no specific provision for such a claim in the Limitation Act, it was rightly held by the lower appellate Court to be governed by art. 120 of the Limitation Act,—the right to sue against Durga having accrued when the latter instituted his pre-emptive suit on the 4th of December, 1883.

But we are of opinion that the third ground of appeal has force. The learned pleaders for the parties admit that the record of the

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case is complete, and that, although Haidar Ali respondent's suit was disposed of by the Court of first instance on a preliminary point, yet that Court did not exclude any evidence offered by the parties. Such being the case, we are of opinion that s. 562 of the Civil Procedure Code was not applicable, and the order of the lower appellate Court remanding the case for a second decision was opposed to the express provisions of s. 564 of the Code. We must therefore, whilst upholding the view of the lower appellate Court on the question of limitation, set aside the order of that Court, and direct it to dispose of the case itself on the merits, with reference to the issues raised by the pleadings of the parties. This view renders it unnecessary for us to dispose of the last ground of appeal, which relates to costs.

We decree this appeal, and, setting aside the order of the lower appellate Court so far as it relates to the suit of Haidar Ali, plaintiff-respondent, remand the case to that Court for disposal according to law. Costs to follow the result.

Appeal allowed.

FULL BENCH.

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November 19.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

RAM GHULAM (PLAINTIFF) *v.* DWARKA RAI AND OTHERS (DEFENDANTS)*.

Civil Procedure Code, s. 244—Mesne profits—Decree for possession of immoveable property—Reversal of decree on appeal—Appellate decree silent as to mesne profits—Suit for recovery of mesne profits.

The plaintiff in a suit for possession of immoveable property obtained a decree for possession thereof, and in execution of the decree obtained possession of the property. This decree was subsequently reversed on appeal by the defendant The decree of the appellate Court was silent in respect of the mesne profits which the plaintiff had received while in possession. The defendant instituted a suit to recover those profits.

Held, per PETHERAM, C. J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ., that the suit was not barred by s. 244 of the Civil Procedure Code, the question raised by such suit, although it might have arisen out of the decree of the appellate Court, not "relating to the execution, discharge or satisfaction of the decree," within the meaning of that section, (because, at that time, no such question had

* Second Appeal No. 1223 of 1883, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Gházipur, dated the 25th May, 1883, affirming a decree of Babu Nilmadhub Roy, Munsif of Gházipur, dated the 12th December, 1882.

arisen or was in existence), and therefore not one in respect of which a separate suit is barred by that section.

Partab Singh v. *Beni Ram* (1) distinguished by OLDFIELD, J.

Per MAHMOOD, J.—That the suit was not barred by s 244, the mesne profits sought to be recovered not having been realized in execution of the decree reversed on appeal.

Per DUTHOIT, J.—The words in cl. (*c*) of s. 244, "any other questions arising &c," should be read as "any other questions *directly* arising"; otherwise the most remote inquiries would be possible in the execution department.

THIS was a reference to the Full Bench by Mahmood and Duthoit, JJ. The portion of the referring order in which the facts of the case were stated was as follows:—

"This is an appeal from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Gházipur, reversing a decree of the Munsif of Gházipur, and dismissing a suit instituted by the plaintiff appellant) on the 27th July, 1882, against the defendants (respondents) for the recovery of Rs. 796-8-0, under the following circumstances:—

'On the 21st October, 1878, Sheocharan mortgaged usufructuarily to Ram Ghulam certain property, and put the mortgagee into possession. On the 24th November, 1879, Sheocharan borrowed from Ram Ghulam some more money, and secured the loan upon the former mortgage. On the 21st June, 1880, Sheocharan sued for redemption of the mortgage of the 21st October, 1878. He was met by the plea that without satisfaction of the tacked mortgage of 1879, he was not entitled to redemption. The Munsif of Gházipur, in whose Court the suit was heard, found the document of the 24th November, 1879, to be a forgery, and decreed redemption as prayed. Execution of this decree was taken out, and Ram Ghulam was formally dispossessed under it on the 3rd December, 1880. Meanwhile Ram Ghulam had appealed to the District Judge, who, on the 1st February, 1881, reversed the Munsif's decree, and declared the mortgagor not entitled to redemption till he should satisfy the tacked mortgage of 1879. Sheocharan appealed to this Court, which, on the 19th December, 1881, dismissed his appeal with costs.

"Neither the decree of this Court nor the decree of the District Judge provided for the contingency of possession of the property having been obtained by the mortgagor under the decree of the

(1) I. L. R., 2 All. 61.

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Munsif. On the 17th July, 1882, Ram Ghulam recovered possession of the property in execution of the final decree of this Court. He has in this suit alleged that he was, as a fact, dispossessed by Sheocharan and the other defendants. on the 6th August, 1880, not in due course of law, but before the date of the Munsif's decree, and he has sued for the recovery of the sum claimed as compensation for the loss of the profits of the property between that date and the 17th July, 1882. Among other pleas taken by Sheocharan in his defence, was one to the effect that the suit is barred by the provisions of s. 244 of the Civil Procedure Code. The Court of first instance overruled this plea, found that the plaintiff's allegations as to the joint action of the defendants in dispossessing him and as to the date and manner of dispossession were correct, and decreed the plaintiff's claim to the extent of Rs. 200 against all the defendants The defendants appealed. The lower appellate Court has found that the plaintiff was not dispossessed on the 6th August, 1880, by all the defendants, but was dispossessed in due course of law by Sheocharan, defendant, alone on the 3rd December, 1880, and it has dismissed the plaintiff's suit on the ground that it is barred by the provisions of s. 244 of the Code of Civil Procedure.

"It is contended in second appeal that it is not so barred."

The learned Judges referred the following question to the Full Bench :—

"When a person is deprived of the possession of immoveable property in execution of a decree, which is afterwards set aside in appeal by a decree which is silent as to the disposal of the proceeds of the property during the interval between the date of effect being given to it and the date on which effect was given to the decree reversed by it, is a suit brought by such person to recover compensation for the loss of such property, or is it not, barred by the provisions of s. 244 of the Code of Civil Procedure?"

Munshis *Kashi Prasad* and *Hanuman Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

Counsel for the appellant were not called on.

For the respondents it was urged that the question in the present suit was one arising between the parties to the suit in

which the decree was passed, and relating to the execution, discharge, or satisfaction of the decree within the meaning of s 244 of the Civil Procedure Code; and, in support of this contention, it was argued that the decree of the appellate Court reversing the original decree also set aside all that had been done in pursuance thereof, and therefore entitled the defendant to restoration of mesne profits without instituting a fresh suit.

The following judgments were delivered by the Full Bench :—

PETHERAM, C J.—I am of opinion that this suit is not barred by s. 244 of the Code of Civil Procedure. The original suit was instituted by the respondent Sheocharan in 1880 for redemption of a mortgage; he obtained a decree, and, in the execution of that decree, the present appellant was dispossessed of the mortgaged property, and the decree-holder obtained possession. He remained in possession for more than a year and the decree was then reversed on appeal; but the appellate Court made no order in regard to the profits which he had received while in possession. The present suit was instituted by the appellant to recover compensation for the loss of these profits. Now, we have two questions to consider. First, could the appellant have recovered the profits under the decree of the appellate Court? Secondly, was he bound to recover them in that manner, or could he maintain a fresh suit for them?

For my own part I doubt whether the appellant could have recovered the profits in execution of his decree. The value of the profits is a question which was not then tried, and I do not see what means the Court had of deciding it, or of giving effect to any order for restitution of profits. The real question before us is, whether this is a matter "arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge, or satisfaction of the decree." It may be that the present question *arose out of* the decree; but it did not "relate to the execution, discharge, or satisfaction of the decree," because at that time no such question had arisen or was in existence. I am therefore of opinion that, whatever powers the Court might possess as to ordering restitution of the amount received by the respondent during his wrongful possession, such a question is not one of the kind referred to in s. 244 of the Civil Procedure Code in respect of which a

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separate suit is barred. The real meaning of s 244 would seem to be that the decree must be enforced by execution, and that the decree-holder may not bring an action upon the decree itself.

OLDFIELD, J.—I am of the same opinion; but I wish to distinguish the present case from *Partab Singh* v. *Beni Ram* (1) which has been referred to In that case the decree was for mesne profits, which were therefore properly recoverable in the execution-department, but here the decree was silent as to mesne profits.

BRODHURST, J.—I also am of opinion that the suit is maintainable.

MAHMOOD, J.—I concur in the conclusion arrived at by the learned Chief Justice, on the ground that the mesne profits collected by the respondent were not realized by him in execution of the decree which was reversed on appeal.

DUTHOIT, J.—I also concur with the Chief Justice; but I wish to add that the words in cl. (*c*) of s. 244, "any other questions arising," &c., should be read as "any other questions *directly* arising:" otherwise the most remote inquiries would be possible in the execution department.

1884 November 22.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

QUEEN-EMPRESS v. JUALA PRASAD.

Criminal Procedure Code, ss. 233, 234—Joinder of charges—Offences of the same kind committed in respect of different persons.

Where a post-master was accused of having, on three different occasions, within a year, dishonestly misappropriated moneys paid to him by different persons for money-orders, *held* that, the offences of which such person was accused being the dishonest misappropriations by a public servant of public moneys, (for as soon as they were paid they ceased to be the property of the remitters), such offences were "of the same kind," within the meaning of s. 234 of the Criminal Procedure Code, and such person might, therefore, under that section, be charged with and tried at one trial for all three offences.

Empress v. *Murari* (2) observed on.

THIS was an application to the High Court to exercise its powers of revision under s. 439 of the Criminal Procedure Code. The applicant was the post-master of the city or branch post-office at Budaun. He was tried by Mr. C. F. Hall, Magistrate of

(1) I. L. R., 2 All. 61. (2) I. L. R., 4 All 147.

the Budaun District, under s. 409 of the Penal Code, for criminal breach of trust in regard to three sums of money paid to him by different persons for money-orders. All three offences were committed in the year 1883. The Magistrate, by an order dated the 3rd May, 1884, convicted the applicant of each offence, and sentenced him to one year's rigorous imprisonment under each conviction,—in all, to three years' rigorous imprisonment. On appeal to the Sessions Judge of the Bijnor-Budaun Division, Mr. J. C. Leupolt, it was contended on behalf of the applicant that, with reference to the case of *Empress* v. *Murari* (1), the joinder of charges was improper. The Sessions Judge, in an order dated the 5th July, 1884, disposed of the contention thus:—"With reference to the High Court ruling, I believe the Calcutta Court (2) have more recently decided that the law does not require the three offences to be against the same person."

The same contention was raised on behalf of the applicant on the present application, which came before Duthoit, J., who referred it to a Divisional Bench, observing as follows:—

"The Session Judge ought not to have followed the authority of another High Court so long as the authority of this Court, to which he is subordinate, was against the views he wished to take of the point raised before him. But there can, I think, be no doubt that the view of the law stated in *Murari's Case* is erroneous; and the Junior Government Pleader informs me that Mr. Justice Straight, who was a party to that decision, recently expressed from the Bench an opinion to this effect. The difference between the terms of s. 453 of Act X of 1872 and those of s. 234 of the present Code of Criminal Procedure, is not sufficient to enable me to get over the difficulty by ruling that the limitation presented in *Murari's Case*, whatever it may have been under the old law, is inapplicable under s. 234 of the present Code. Could I hold myself competent to do so, I should refer to a Full Bench the following question:—With reference to the terms of s. 234 of the Code of Criminal Procedure, is it, or is it not, necessary that the three offences contemplated by that section should have been committed against the same person? But with reference to the

(1) I. L. R., 4 All. 147. (2) Manu Miya v. The Empress, I. L. R., 9 Calc. 371.

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terms of Rule of Practice No. 2 of 1870, I do not find myself competent to do more than order the case to be heard by a Division Court of two Judges."

The case was accordingly laid before Petheram, C. J., and Duthoit, J., who referred the following question to the Full Bench, namely:—

"With reference to the terms of s. 234 of the Code of Criminal Procedure, is it, or is it not, necessary that the three offences contemplated by that section should have been committed against the same person?"

Mr. *C. Dillon* and Pandit *Nand Lal*, for the applicant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

Pandit *Nand Lal*, for the applicant.—The prisoner in this case objected to the single trial, and the objection was disallowed by the Sessions Judge. We rely on the case of *Empress* v. *Murari* (1) in which it was laid down by Straight and Tyrrell, JJ., that "the combination of three offences of the same kind, for the purpose of one trial, can only be where they have been committed in respect of one and the same person, and not against different prosecutors, within the period of twelve months, as provided by the Criminal Procedure Code." This case was no doubt dissented from by the Calcutta High Court (Field and Norris, JJ.) in *Manu Miya* v. *The Empress* (2). In that case, however, Norris, J., showed that the practice in England, in cases of felony, is to allow an objection by the prisoner to the joint trial. [PETHERAM, C. J.—The practice in England has nothing to do with the question referred to us. That can only be decided with reference to the construction to be placed on ss. 233 and 234 of the Criminal Procedure Code.] In India, where the distinction between felonies and misdemeanours does not exist, the practice of allowing the prisoner's objection to joint trial should, as a matter of expediency, be applied to all offences. The Calcutta High Court admit that it may be the better course for charges not to be joined, and that "the Court should at all times be anxious to lend a willing ear to any application" for separation of charges, and for separate trials.

(1) I. L. R., 4 All. 147. (2) I. L. R., 9 Calc. 371

[DUTHOIT, J.—We have not to consider the expediency, but only the legality of the course pursued by the Magistrate and Judge. PETHERAM, C J.—The reason of the practice in England is that the jury, who in England are judges of the facts, may not be prejudiced against the prisoner when he is being tried upon one charge, and evidence has just been given against him upon the other charges. In this country, the whole case is generally tried by a Judge, who is supposed to be less accessible to prejudice, and who, under s. 234, "*may*" separate the charges, if the joint trial would be unfair to the accused.]

The *Junior Government Pleader* (Babu *Dwarka Nath Banárji*) for the Crown.

The following judgment was delivered by the Full Bench:—

PETHERAM, C J. (OLDFIELD, BRODHURST, MAHMOOD, and DUTHOIT, JJ., concurring). I have no doubt that this case was properly decided, and that three charges of this kind may be joined under s. 234 of the Criminal Procedure Code. The question is of the simplest possible kind, being one merely of the proper construction to be placed upon the two ss. 233 and 234 of the Code. S. 233 provides that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in ss. 234, 235, 236, and 239." This section contains the general law, and the reason of it is, that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the Court trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges.

The Legislature has, however, made certain exceptions. One of these is contained in s. 234 of the Code, which provides that when a person is accused of more offences than one of the same kind, committed within the space of twelve months from the first to the last of such offences, he *may* be charged with and tried at one trial for, at all events, as many as three of them In this case we have a public servant accused of having, on three occasions, embezzled moneys which were public property, for, as soon as they were paid to him, they ceased to be the property of the persons

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who paid them. All three acts of embezzlement were committed within one year, and each was committed in the same circumstances as the others. How can it be said that these offences were not "of the same kind?" They did not merely resemble each other, but were the same offence. I see no reason why they should not be joined in the same trial; and I am of opinion that the Magistrate was right in joining them. As regards the case of *Empress* v. *Murari* (1), to which reference has been made, that was decided by Mr Justice Straight under a different statute, and his decision in that case will be unaffected by ours in this.

1884 *November* 29.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit

JAWAHRA AND OTHERS (DEFENDANTS *v.* AKBAR HUSAIN (PLAINTIFF.)*

Religious endowment—Mosque—Form of suit—Right to sue—Civil Procedure Code, ss. 30, 539

Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance, and is competent to maintain a suit against any one who interferes with its exercise, irrespective of the provisions of ss. 30 and 539 of the Civil Procedure Code.

S. 30 of the Civil Procedure Code applies only to cases in which many persons are *jointly* interested in obtaining relief, and not to cases in which an individual right has been violated.

Zafaryab Ali v. *Bakhtawar Singh* (2) referred to. *Jan Ali* v. *Ram Nath Mundul* (3) dissented from.

THE plaint in this case stated that in a village belonging to the plaintiff there was an "old dilapidated mosque intended for Muhammadan worship," which "was protected and looked after" by him and other Muhammadans of the village; that in consequence of the mosque and its appurtenances being "*wakf*," it had been excluded from the partition of the village, and the plaintiff intended to repair the mosque; that the defendants had enclosed a part of the land, and had also erected a mill on a part of it; that they had, by means of certain erections of thatch and mud, con-

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* Second Appeal No. 1499 of 1883, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 13th August, 1883, affirming a decree of Maulvi Muhammad Sayid Khan, Munsif of Muzaffarnagar, dated the 16th February, 1883.

(1) I. L. R., 4 All. 147 (2) I. L. R., 5 All. 497.
(3) I. L. R., 8 Calc. 32.

verted the mosque into a place for storing straw—all of which acts they had wrongfully done ; that the plaintiff had remonstrated with the defendants and asked them to remove the things, but they paid no attention to this request, and prevented the plaintiff from making repairs ; and that these "unlawful acts of the defendants were calculated to affect the character of the said endowed property, and were an insult to the religion." Upon these allegations, the plaintiff claimed "a declaration of his right to repair the old dilapidated mosque..... .. ..by removal of the defendants' interference," and the demolition of the compound, and removal of the mill, the thatches, and the straw stored in the mosque. The plaint concluded with these words : —"Suit brought according to the doctrines of the Muhammadan religion and on written and oral evidence." The defendants did not deny the acts imputed to them by the plaintiff. They defended the suit upon the grounds, amongst others, that the building which was the subject-matter of the suit was not a mosque but an "*atta* or fortress made for the purpose of shelter from robbers in former days" ; and that the plaintiff had no right to repair it. The Court of first instance found that the building was a mosque and not an "*atta*," and held that "the plaintiff, as a Muhammadan and guardian of religious buildings, was entitled to repair the mosque." It therefore gave the plaintiff a decree as claimed. On appeal, the defendants contended that "a claim for endowed property cannot be instituted and heard without the permission of the Advocate-General under Act XX of 1863." Upon this point the Court observed as follows :—"The first ground of appeal must be overruled. In a similar case—*Zafaryab Ali* v. *Bakhtawar Singh* (1)—our own High Court have just ruled that s. 539 of the Civil Procedure Code would not apply, and that the plaintiffs, as persons entitled to frequent the mosque, can maintain the suit. This, however, is quite opposed to a ruling of the Calcutta High Court—*Jan Ali* v. *Ram Nath Mundul* (2)." The Court also observed as follows :—"Respondent said at first that he was the only Musalman in the village, the population of which is variously stated by appellants as 500 or 600, by respondent as only 70. If this be so, of course s. 30 of the Civil Procedure Code would not

(1) I. L. R., 5 All., 497. (2) I. L. R., 8 Calc. 32.

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apply. But it comes out that there is at least one other, Shaikh Jani, the custodian of a shrine or *dargah*, with his son or sons." The decree of the Court of first instance was affirmed.

On second appeal, the defendants contended (i) that the suit was not maintainable in its present form, as no special right to sue in the plaintiff was disclosed; and (ii) that as there were probably other Muhammadan residents in the village, the suit was not maintainable without compliance with the provisions of s. 30 of the Civil Procedure Code.

The Divisional Bench (MAHMOOD and DUTHOIT, JJ.) hearing the appeal made the following order of reference to the Full Bench:—

"The grounds taken in this appeal and the arguments in their support by the learned pleader for the appellants, raise a question of much difficulty and considerable importance. The question relates to the *locus standi* possessed by Muhammadans to institute suits which relate to their religious and charitable endowments and buildings, where the cause of action alleged is stated to be either injury to such buildings, or malversation of the funds, or wrongful alienations of such property, or other similar circumstances which are destructive to, or inconsistent with the objects of such endowments or *wakf* property. The question has become more complicated by reason of the provisions of the law as contained in ss. 30 and 539 of the Civil Procedure Code.

In the case of *Zifaryab Ali* v. *Bakhtawar Singh* 1) a Division Bench of this Court held that a suit to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejectment of the purchaser, was maintainable by Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment. It was also held that s. 539 of the Civil Procedure Code had no application to the case, the endowment being a religious institution within the meaning of s. 24 of the Civil Courts Act (VI of 1871), and therefore governed by Muhammadan Law. On the other

(1) I. L. R., 5 All 497.

hand, in the case of *Jan Ali* v. *Ram Nath Mundul* (1) the Calcutta High Court applied s. 539 of the Civil Procedure Code to similar suits, by holding that so much of the prayer in the plaint as fell within the provisions of s. 539 of the Code, the plaintiffs were not entitled to sue for, as they were not "persons having a direct interest in the trust" within the meaning of the section. It was also held in that case that, though the plaintiffs might possibly have obtained leave to sue under s. 30 of the Code on behalf of themselves and the other persons attending the mosque, they, not having obtained such leave, were not entitled to institute a suit for the purpose of obtaining the relief asked for. This ruling was referred to in the case already cited, but although there is no express allusion to the case in the judgment of this Court, the ruling was apparently disapproved. Again, in the case of *The Muhammadan Association of Meerut* v. *Bakhshi Ram* (2) a Division Bench of this Court appears to have approved of the rule laid down by the Calcutta Court so far as s. 30 of the Code is concerned.

In view of its great importance we refer to the Full Bench the following question:—

Can any Muhammadan or Muhammadans maintain a suit like the present, irrespective of the provisions of ss. 30 and 539 of the Civil Procedure Code?"

Munshi *Kashi Prasad*, for the appellants.—The property to which the suit relates is endowed property. Such property belongs to the Muhammadan community. The right of Muhammadans in such property is like the right in a public road [PETHERAM, C. J. It is more like the right in a private road.] The plaintiff, as a Muhammadan, has not such an interest in the property, as entitles him to maintain a suit on his own account. He ought to have sued for the Muhammadan community. [PETHERAM, C. J., Your argument would be good if the Muhammadan community were the public.] *Jan Ali* v. *Ram Nath Mundal* (1) is in point.

Mr. *Amiruddin*, for the respondent.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—I have no doubt that the plaintiff was competent to maintain this action. The question has arisen in conse-

(1) I. L. R., 8 Calc. 32. (2) I. L. R., 6 All. 284.

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quence of the peculiar way in which property of this kind is held. According to Muhammadan custom, the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Muhammadan community are entitled to use it for purposes of devotion whenever the mosque is open. Now, the Muhammadans are only a part of the population of this country, so that the right is not vested in the general public, and therefore it resembles a right in a private way Everyone who has such a right is entitled to exercise it without hindrance, and has a right of action against anyone who interferes with its exercise. It is not a *joint* right; it is a right which belongs to many people. S. 30 was meant to apply to a case in which many persons are *jointly* interested in obtaining relief; and where, under the old law, it would have been necessary for all of such persons to be joined, s. 30 prevents the record from being unnecessarily encumbered by many names, and allows one or more, with the permission of the Court, to sue or defend on behalf of all. The rule was introduced in order to prevent rich persons from joining together and putting forward a pauper to conduct the suit, and thus escaping all costs. In the present case it is clear that an individual right has been violated, and that an action will therefore lie.

MAHMOOD, J.—I wish to add a few observations regarding the Muhammadan Law as to endowments generally, and in particular as to mosques. It must, in the first place, be shown that the Muhammadan people have a right to maintain a suit like the present But authorities on such a point need not be cited, for the principle is too well known among Muhammadan lawyers. The rule of the Muhammadan Law on the subject is that when anyone has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as delivery, &c., an endowment is immediately constituted; his act deprives him of all ownership in the property, and, to use the technical language of Muhammadan lawyers, vests it in God "in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creatures."

A mosque is an endowment of this kind, and the Muhammadan community, or any member of it, has a right to enter the mosque and to pray there. The learned Chief Justice has shown that, under the circumstances in India, a mosque cannot be regarded as vested in the public at large, but in the Muhammadan part of the public, and it cannot be said that any Muhammadan is bound to maintain a suit on behalf of the public generally. The right of a Muhammadan to use a mosque is, as the learned Chief Justice has said, like the right to use a private road; any one who has the right may maintain a suit in respect of it. This settles the question as to s. 30 of the Civil Procedure Code. That section applies only to cases where no *individual* right is interfered with; but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for purposes of devotion. He had a private right, and it was violated.

In regard to s. 539 of the Civil Procedure Code, I was one of the Bench who made this reference, and I wish to add my reasons for holding that the section does not apply to the present case. There is here no question of trust or trustee, or of malversation of trust funds, or other breach of trust. The object of such a suit as this is not such as is contemplated by any of the various clauses of s. 539. In conclusion, I have a few words to say regarding the case which has been cited—*Jan Ali* v. *Ram Nath Mundul*, (1)—decided in the Calcutta High Court by Prinsep and Field, JJ. Towards the end of the judgment in that case the following observations occur: —" Now, so far as regards these prayers, we think that the plaintiffs were not authorized to institute this suit merely by reason of having that interest which is set out in para. 10 in the plaint, that is, an interest created by their being followers of the Moslem religion, living in the vicinity of the mosque, and being in the habit of attending the musjid. That interest is common to them with a large number of other persons —common to them with, we will not say all the Muhammadan population of the country, but certainly with all the Muhammadan residents in the vicinity; and we think that this is a case which falls within the provisions of s. 30 of the Civil Procedure

(1) I. L. R., 8 Calc. 32.

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Code. That section enacts that "where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue, or be sued, or may defend in such suit, on behalf of all parties so interested." It may be quite possible that if these plaintiffs had applied to the Court under the provisions of s. 30, they would have obtained permission to institute this suit; but, not having obtained that permission, they certainly were not entitled to institute the suit; and, under the circumstances, we think that the ground of objection taken by the defendants in the second paragraph of their written statement, and which forms the subject of the second issue, was a good objection; and that this suit was properly dismissed by the District Judge." Now, with all due deference to the learned Judges who delivered that judgment, I dissent from the remarks which I have just read. I hold that it is an undoubted principle of Muhammadan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it. It is impossible to imagine whose interest in the mosque can be direct if theirs is not, and I should say, that even if this case fall under the purview of s. 539, they would have *locus standi* to maintain the suit. But, for the reasons which I have already given, I am of opinion that neither s. 30 nor s. 539 of the Civil Procedure Code applies to the present case, and that the plaintiff was competent to maintain the suit.

My answer to the reference is, therefore, in the affirmative.

OLDFIELD, BRODHURST, and DUTHOIT, JJ., concurred.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

1884 *November* 23.

GANDHARP SINGH AND ANOTHER (DEFENDANTS) *v.* SAHIB SINGH AND ANOTHER (PLAINTIFFS).*

Pre-emption—Wajib ul arz—"Co sharer"—Joint Hindu family.

The members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's book as a sharer in the mahal, are "co-sharers," for the purposes of pre-emption, in the sense of the *wajib-ul-arz.*

Second Appeal No. 1418 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Mainpuri, dated the 4th August, 1883, affirming a decree of Pandit Kashi Narain, Munsif of Etawah, dated the 9th April, 1883.

THE plaintiffs in this case, recorded in the revenue registers as co-sharers in a village, sued to enforce the right of pre-emption in respect of the sale by another co-sharer of his rights in the village. The suit was based on the *wajib-ul-arz* and village custom. That document gave "co-sharers," as against strangers, a right of pre-emption, in the case of a sale by a co-sharer of his rights in the village. The sale in question had been made to four persons, two of whom were recorded in the revenue registers as co-sharers in the village. The other two were Gandharp Singh and Bisal Singh, sons of Ishri Singh. Ishri Singh was recorded in the revenue records as a co-sharer. The share in respect of which his name was so recorded was joint Hindu family property. The main defence to the suit was that the defendants-vendees were co-sharers in the village, and that therefore the plaintiffs' suit was not maintainable.

The Court of first instance (Munsif of Etawah) held that the defendants-vendees, Gandharp Singh and Bisal Singh, were not "co-sharers" in the village within the meaning of the *wajib-ul arz*, because, although as members of a joint Hindu family, they might be interested in the share recorded in their father's name, their names were not recorded as co-sharers in the revenue registers. It further held that, although the other defendants-vendees were "co-sharers," yet the sale was invalid, in regard to them also, as they had joined in purchasing with persons who were not "co-sharers." It accordingly gave one of the plaintiffs, Aman Singh, a decree, refusing, for reasons which it is not material for the purposes of this report to state, to give the other plaintiff a decree. On appeal by the defendants-vendees the lower appellate Court (Subordinate Judge of Mainpuri) also held that Gandharp Singh and Bisal Singh were not "co-sharers." It observed as follows :—"As to the above point I am of opinion that under the decisions in *Heera Lal* v. *Khowanee* (1) and *Bheekum Singh* v. *Gordhun Singh* (2) the son cannot be considered to be a sharer by virtue of his right of inheritance. When Gandharp Singh and Bisal Singh cannot be considered to be co-sharers in the village, they are strangers. The co-sharers in the *wajib-ul-arz* mean those persons who are entered in the *khewat*."

(1) N.-W. P. S. D. A. Rep., 1865, p. 71. (2) N.-W. P. S. D. A. Rep., 1865, p. 251.

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On second appeal by the defendants-vendees Gandharp Singh and Bisal Singh, it was contended on their behalf that they were co-sharers in the village, within the meaning of the *wajib-ul-arz*, and that the suit was therefore not maintainable as against them.

The Division Bench (STRAIGHT, Offg. C. J., and DUTHOIT, J.) hearing the appeal referred the following question to the Full Bench :—

"Are the members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's book as a sharer in the mahal, co-sharers for the purposes of pre-emption in the sense of the *wajib-ul-arz*?"

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

Pandit *Ajudhia Nath*.—The vendees Gandharp Singh and Bisal Singh are "co-sharers" in fact. Their not being recorded is immaterial, so far as the right of pre-emption is concerned. [He was stopped.]

Babu *Jogindro Nath*.—It is not denied that, according to the Mitakshara law, the son of a Hindu father is regarded as a co-sharer with his father. But with reference to the right of pre-emption, which, under the *wajib-ul-arz*, rests on contract, those only who have signed the contract, *i.e.*, whose names are recorded, can be regarded as parties to the contract, and competent to claim rights by virtue of it. [DUTHOIT, J.—You say in fact that apart from the paper, there is no right of pre-emption, and that therefore those only who have signed the paper are enjoying the right? PETHERAM, C. J.—Is not the *wajib-ul-arz* the evidence of the contract, rather than the contract itself?] Sometimes the *wajib-ul-arz* not only states the customs of those living under it, but incorporates contracts made by them. These contracts are sometimes introductory of new rights: thus the right of pre-emption may be created by adding a clause to the *wajib-ul-arz*. The law of pre-emption is not part of the personal law of the Hindus. It acquires force only among those Hindus who have adopted it as a matter of custom or else as a matter of contract. In no third way can it exist among Hindus. [PETHERAM, C. J.—If these defendants were parties to the contract, then they would no doubt be entitled to

claim pre-emption under it. You say that there is no evidence of a contract for those who have not signed the paper. But they affirm that they are parties to the contract.] They claim as the sons of a person who have signed, and as having an equal right with their father. [PETHERAM, C. J.—All that they claim is to live under the law of the village. MAHMOOD, J.—The manager of a Hindu joint family has power to bind all the members by his contracts, and therefore the signature of the father would be binding on the sons.] Assuming that to be the case, then if the father should omit to assert the right, his omission also should be binding on the sons, and should prevent any assertion of the right by them. I do not deny that these defendants are co-sharers, but only that they should not be regarded as such for purposes of pre-emption, because they are not parties to the *wajib-ul-arz*. I rely on the following authorities:—*Mahadeo Singh* v. *Nanda Singh* (1), *Heera Lal* v. *Khowanee* (2), *Bheekum Singh* v. *Gordhun Singh* (3).

PETHERAM, C J.—The question before us is whether, assuming that the sons in a joint Hindu family are to be regarded as co-sharers, they are not to be regarded as recorded co-sharers. To me it seems that the question answers itself. It is virtually asking whether many equal co-sharers are to be considered as having equal rights, and I shall hold that they have, until the contrary is shown. To say that the defendants are precluded from exercising their rights appears to me to be idle and contrary to justice; and I have no hesitation in holding that all the co-sharers, whether signatories of the *wajib-ul-arz* or not, have equal rights, both in respect of pre-emption and in other respects.

OLDFIELD, J.—I am of the same opinion.

BRODHURST, J.—I am of the same opinion.

MAHMOOD, J.—I also concur, but I only wish to observe that I have seen cases in which it is said in the *wajib-ul-arz* that the recorded share-holders shall be entitled to claim the right of pre-emption. If that had been the case here, I might perhaps have been disposed to hold that co-sharers whose names were not recorded in the revenue papers were debarred from exercising the right;

(1) Weekly Notes, 1884, p 100. (2) N.-W. P. S. D. A. Rep., 1865, p. 71.
(3) N.-W. P. S. D. A. Rep., 1865, p. 251.

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but in the *wajib-ul-arz* now in question no such expression occurs, and therefore the answer which the learned Chief Justice has given fully applies to the case.

DUTHOIT, J.—I have no hesitation in answering the question in the affirmative.

1884 *November* 29.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

SHEODISHT NARAIN SINGH AND ANOTHER (DEFENDANTS) *v.* RAMESHAR DIAL AND ANOTHER (PLAINTIFFS)

Jurisdiction—Civil and Revenue Courts—Landholder and tenant—Declaratory decree—Act XII of 1881 *(N.-W. P. Rent Act), s.* 95 *(n).*

A suit in which the plaintiff claims, as the tenant of land, that he may be declared to be the tenant, and that the defendant, the landholder, may be restrained from interfering with his right to the land as a tenant, and in which the defendant denies the relation between him and the plaintiff of landholder and tenant, is not a suit which is exclusively cognizable in the Revenue Court.

THE plaintiffs in this case alleged that they held 107 bighas 16 biswas of cultivatory land at a rent of Rs. 147-8-0, and 1 bigha of grove-land at a rent of 12 annas, and 1 bigha 5 biswas of rent-free land, as their ancestral property; that they used plot No. 254, consisting of 11 biswas, which was a portion of their rent-paying land, and plot No. 253, consisting of 1 bigha 5 biswas rent-free land, as a threshing-floor and for stacking corn; that the defendants, who were the zamindars, denied their right to the two plots mentioned, and interfered with their possession by various acts stated in the plaint; and they asked for a decree declaring their right to the land, and that the grain which the defendants had stored on the land might be removed, and the defendants might be restrained from interfering with their right to the land. The defendants' answer to the suit was that the plots did not belong to the plaintiffs, either as part of their rent-paying holding or rent-free holding, but were waste land belonging to them and in their possession.

The Court of first instance dismissed the suit. The lower appellate Court gave the plaintiffs a decree as claimed.

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* Second Appeal No. 21 of 1884, from a decree of D. S. Gardner, Esq., District Judge of Benares, dated the 23rd August, 1883, reversing a decree of Shah Ahmad-ullah, Munsif of Benares, dated the 5th June, 1883.

On second appeal the defendants contended that the suit was not maintainable in the Civil Courts in respect of plot No. 254, claimed by the plaintiffs as part of their rent-paying holding, as the dispute or matter was one on which an application might be made under s. 95 (*n*) of Act XII of 1881, the N.-W. P. Rent Act, to the Revenue Court.

For the respondents it was contended that s. 95 (*n*) refers to cases where the relation of landlord and tenant has been recognized by the parties suing, and in which a landlord has dispossessed an acknowledged tenant otherwise than according to the provisions of the Rent Law, and that section did not apply to the present claim in which the dispute was as to the rights of the parties in the land.

The Divisional Bench (OLDFIELD and BRODHURST, JJ.) hearing the appeal referred to the Full Bench the question whether the claim in respect of plot No. 254 was exclusively cognizable by the Revenue Court.

The following cases were noted, in the order of reference, as cases to which reference might be made :—

Sheodan Singh v. *Seetal Singh* (1); *Shambhu Narain Singh* v. *Bachcha* (2); *Kalian Das* v. *Tika Ram* (3); *Kanahia* v. *Ram Kishen* (4); *Sawai Ram* v. *Gir Prasad Singh* (5); *Muhammad Abu Jafar* v. *Wali Muhammad* (6); *Sukhdark Misr* v. *Karim Chaudhri* (7); *Birbal* v. *Tika Ram* (8); *Lala Mal* v. *Salar Bakhsh* (9); *Ram Prasad* v. *Ram Shankar* (10); *Muhammad Zaki* v. *Hasrat Khan* (11); *Lalu* v. *Sadiya* (12); S. A. No. 456, decided the 2nd August, 1883 (13); S. A. No. 1014, decided the 20th May, 1884 (14); S. A. No. 1503, decided the 20th May, 1884 (15).

Lala *Lalta Prasad* and Munshi *Hanuman Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

(1) N.-W. P. S. D. A Rep., 1865, p. 282
(2) I. L. R., 2 All, 200.
(3) I. L. R., 2 All., 137.
(4) I. L. R., 2 All., 429.
(5) I. L. R., 2 All., 707.
(6) I. L. R, 3 All, 81.
(7) I. L. R, 3 All., 521.
(8) I. L. R., 4 All., 11
(9) Weekly Notes, 1881, p. 105.
(10) Weekly Notes, 1882, p. 58.
(11) Weekly Notes, 1882, p. 61.
(12) Weekly Notes, 1882, p. 62.
(13) Not reported.
(14) Not reported.
(15) Not reported.

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For the appellants it was contended that the suit was not cognizable in the Civil Courts. The plaintiffs seek to have a right of tenancy declared. This is a relief which the Revenue Courts are competent to give them. The question whether a man is a tenant or not is one for the Revenue Courts to determine. If the plaintiffs were suing for possession, their suit would be exclusively cognizable in the Revenue Courts. Therefore they should go to those Courts for the relief they now seek.

The following judgments were delivered by the Full Bench :—

PETHERAM, C J.—In my opinion the suit as brought is cognizable in the Civil Courts, the jurisdiction of those Courts not being barred by s. 95 of the Rent Act. In order to oust the jurisdiction of the ordinary Courts of the country, the words of the enactment excluding their jurisdiction must be clear. The question is whether s. 95 says that this particular suit shall not be brought. The plaintiff might have applied to the Revenue Court for possession of the land on the ground of having been wrongfully dispossessed ; and I am inclined to think that, if he had sought for possession of the land in this suit, his claim would have been exclusively cognizable in the Revenue Court. But when a man's land is interfered with, he may bring an action of trespass. The plaintiff brings this suit to restrain trespass on his land, and I think that the suit is not one which is made by s. 95 exclusively cognizable in the Revenue Court.

OLDFIELD, J.—The suit as brought is one for the Civil Courts to try. The question whether, if the plaintiffs had claimed possession, the suit would have been cognizable in the Civil Courts, does not arise. I am inclined to think that, even had he made such a claim, the suit would have been cognizable in the Civil Courts. The policy of the Rent Act is to exclude the jurisdiction of the Civil Courts in cases relating to disputes arising out of the relationship of landlord and tenant. Where the person sued disputes that relation, the Revenue Court would not have exclusive jurisdiction. In such a case the tenant could not, by making an application under s. 95 (*n*) of the Rent Act, obtain entire relief. That clause refers to the case of a landlord who has ejected an acknowledged tenant otherwise than under the provisions of the Rent Act.

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BRODHURST, J.—I agree.

MAHMOOD, J.—I have no doubt that the suit as brought is cognizable in the Civil Courts. I need not consider the question whether, if the plaintiffs claimed possession, the suit would be cognizable in those Courts.

DUTHOIT, J.—The suit as brought is, in my opinion, cognizable in the Civil Courts.

APPELLATE CIVIL.

1884 *December* 3.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

TIKA RAM AND OTHERS (DEFENDANTS) v. KHUDA YAR KHAN (PLAINTIFF).*

Jurisdiction—Civil and Revenue Courts—Resumption of rent-free grant—Act XII of 1881 (*N.-W. P. Rent Act*), *ss.* 30, 95 (*c*)—*Act XIX of* 1873 (*N.-W. P. Land Revenue Act*), *s.* 241 (*h*).

A zamindar brought a suit to recover possession of certain land in the village which was held by the defendants rent-free, in consideration of rendering services as *khera-patis*, on the ground that he was entitled, as zamindar, to dispense with their services, and that therefore they no longer possessed any right to hold the land. The claim was resisted by the *khera-patis* on the ground that for many years they had been in possession of the land as muafi-holders.

Held that the dispute so raised was a matter which could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the N.-W. P. Rent Act (XII of 1881), and that the cognizance of the suit by the Civil Court was therefore barred by cl. (*c*) of s. 95 of that Act, and that, for similar reasons, the Civil Court, under cl. (*h*) of s. 241 of the N.-W. P. Land Revenue Act (XIX of 1873) could not exercise jurisdiction over the matter of the suit.

THIS suit was instituted in the Civil Court. The plaintiff was the proprietor of a *patti* of a mahál in which the defendants held certain land. He sued the defendants for possession of this land. He alleged that "the defendants had been appointed '*kherá-patis*'† by the former proprietors of the village; that in consideration of their services as such, the produce of the land was remitted to them, and they were entitled to hold the land simply to enjoy the produce thereof so long as they held the said office, the tenure of which depended on the will of the zamíndár; that they had wrongfully

* Second Appeal No. 44 of 1884, from a decree of Maulvi Muhammad Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 21st November, 1883, reversing a decree of Maulvi Muhammad Aziz-ud-din, Munsif of Pilibhít, dated the 26th May, 1883.

† *Kherá-pati*—A Brahman entitled to perform certain religious ceremonies, and to receive the fees appertaining thereto.—FALLON.

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planted a grove on the land; that on the 1st July, 1882, all the inhabitants of the village and the plaintiff had dismissed them from their posts by reason of their misconduct and drunkenness." The defendants set up as a defence to the suit that the land had been granted to them four hundred years ago, and they had since that time been "in proprietary possession of it without paying rent," and the plaintiff had no right in the land. They alleged as follows:—"The plaintiff has no right, inasmuch as the former zamíndár, the predecessor of the plaintiff, did not interfere with the defendants' proprietary right; that the post of '*kherá-pati*' is a religious ono and is not a village office; that the duty of a '*kherá-pati*' is to set fire to the *holi;* and the plaintiff, as a Muhammadan, is not competent to dismiss the defendants or interfere with religious matters." The first issue fixed for trial by the Court of first instance (Munsif of Pilibhít) was as follows:—"Is the land in suit revenue-paying land belonging to the zamíndár, or *muafi* land belonging to the defendants? How long is it since the defendants have been in possession? What is the nature of their tenure? Did they ever pay any rent?"

Upon this issue the Court found as follows:—"As to the first issue, I find that the land in suit is revenue-paying land granted to '*kherá-patis*' by the zamíndárs. The witnesses for the defendants fully show that the defendants and their ancestors have been in possession of this land for more than 50 or 60 years. Even the witnesses for the plaintiff do not state that the defendants have recently got possession; they simply say that the defendants have recently planted the grove. The defendants are in possession as muafidars, and have never paid any rent." Deciding the other matters in dispute in the suit in favour of the defendants, the Court of first instance dismissed the suit. On appeal by the plaintiff, the lower appellate Court (Subordinate Judge of Bareilly) remanded the case for the trial of certain issues relating to the custom prevailing in the village regarding the appointment and dismissal of a "*kherá-pati*," and of the questions whether the plaintiff had, as zamíndár, dismissed the defendants from their office, and whether the plaintiff, in that capacity, was competent to dismiss them. It observed:—"It is an admitted fact that the defendant holds possession of the disputed land in lieu of his rendering service as

'*kherá-pati.*' He does not state that he holds possession of it in any other right. Therefore, agreeably to *Hurrogobind Raha* v. *Ramrutno Dey* (1), it cannot be admitted that the defendant has any right left to him after his services have been dispensed with, or that the expiration of any period is beneficial to him and prejudicial to the plaintiff, the zamíndár." These issues were found by the Court of first instance against the defendants. On the return of the findings, the defendants took an objection to the jurisdiction of the Civil Courts to try the suit, contending that it was one cognizable exclusively in the Revenue Courts. This objection the lower appellate Court disallowed, and, in accordance with the findings on remand, gave the plaintiff a decree for possession of the land in dispute.

On second appeal, the defendants contended that the cognizance of the suit by the Civil Courts was barred by s. 95 of the N.-W. P. Rent Act (XII of 1881).

Munshi *Hanuman Prasad*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (BRODHURST and MAHMOOD, JJ.) delivered the following judgment :—

MAHMOOD, J.—The first ground of appeal must prevail. The Court of first instance found that " the defendants and their ancestors have been in possession of this land for more than 50 or 60 years," and that they " are in possession as muafi-holders, and have never paid any rent." The finding has not been disturbed by the lower appellate Court, and indeed the plaintiff's claim proceeds upon admission of these facts. The suit has been instituted on the ground that the plaintiff, as zamíndár of the *patti* in which the land in suit is situate, had the right of dismissing the defendants from the religious office of *kherá-pati*, in lieu of which they held the land ; that their services, being no longer required, have been dispensed with, and they therefore no longer possess any right to hold the land. The main object of the suit is to oust the defendants from the land.

The defendants resisted the suit on various grounds, but they did not base their defence on any title higher than that of being

(1) I. L. R., 4 Calc., 67.

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grantees of the rent-free tenure as *kherá-patis* of the village.

We are of opinion that the dispute so raised in this suit is a matter which could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the Rent Act (XII of 1881), and that the cognizance of the suit by the Civil Court was therefore barred by cl. (*c*) of s. 95 of the Act, and that, for similar reasons, the Civil Court under cl. (*h*) of s. 241 of the Revenue Act (XIX of 1873) could not exercise jurisdiction over the matter of the suit.

The cross-objections under s. 561 of the Civil Procedure Code have been abandoned by the learned pleader for the respondent.

We decree the appeal, and, setting aside the decree of the lower appellate Court, restore that of the Court of first instance. Costs in all Courts will be paid by the plaintiff-respondent.

Appeal allowed.

1884 *December* 4.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

HAR DAYAL AND OTHERS (JUDGMENT-DEBTORS) *v.* CHADAMI LAL (DECREE-HOLDER).*

Decree for sale of mortgaged property—Execution of decree—Application for execution before time allowed for payment—Act IV of 1882 (*Transfer of Property Act*), *ss.* 86, 88.

An application for execution of a decree for sale of mortgaged property passed under s. 88 of Act IV of 1882 (Transfer of Property Act), and which directed that if the decree were not satisfied within two months the property should be sold, ought not to be allowed before the expiration of the period therein provided.

A DECREE for the sale of mortgaged property, dated the 17th January, 1884, exempted the person of the judgment-debtor, and directed that if the decree was not satisfied within two months, the judgment-debtors' 6 biswansis 15 kachwansis of land "with its groves, tanks, and other appurtenances" should be sold. On the 14th February, 1884, or before the expiration of the period provided by the decree, the decree-holder applied for the attachment and sale of the crops growing on the land. The judgment-debtors objected to this application on the ground that the crops

* Second Appeal No. 62 of 1884, from an order of C. J. Daniell, Esq., District Judge of Farakhabad, dated the 6th May, 1884, affirming an order of Sayyid Zakir Husain, Munsif of Farakhabad, dated the 29th March, 1884.

were not part of the mortgaged property, and that application for execution had been made before the expiration of the period provided by the decree. The Court of first instance (Munsif of Farakhabad) disallowed this objection, observing as follows :—"In my opinion both the objections should be disallowed. In the first place, the decree does not declare that any other property than that hypothecated would not be liable. The hypothecated property consists of 6 biswansis 15 kachwansis and a fraction including sír-lands, ponds, groves, and other appurtenances; but it is the produce of sír-lands which is now in question ; and I think it is properly liable to be taken in execution of the decree. No doubt the decree authorizes the sale of the hypothecated property in case the amount thereof is not paid within two months; but the fact of allowing a time under s. 88, Act IV of 1882, does not mean that the decree-holder shall in no case have the power to execute his decree before that time. The Legislature has authorized the Court to allow time at its discretion, in order that judgment-debtors should have an opportunity to take proper steps to protect their property, and not in order to prevent the execution of decree within that time. It is evident that, as yet, the hypothecated property has not been brought to sale. The judgment-debtor, instead of taking steps to satisfy the decree and save his property, seems to be anxious to have his property sold by the decree-holder ; he only wishes to prevent the attachment of his grain produce. I do not think that the judgment-debtor's pleas have any weight."

On appeal by the judgment-debtors, the lower appellate Court (District Judge of Farakhabad) affirmed the order of the Court of first instance. It observed as follows :—

"This decree decree-holder seeks to execute within the prescribed period of two months, on the ground that the judgment-debtor is making away with the 'appurtenances,' that is, the crop growing on the land. The Court executing the decree allowed execution up to the point of attachment of the property, and, in respect of the crops, ordered their sale, and that the proceeds of the sale should be paid into Court. It is objected that no attachment or any process in execution of the decree could take place within the prescribed period of two months. I do not, however, take this view of the operation of ss. 86 and 88 of the Transfer of Property

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Act. A Court executing a decree is bound to take all reasonable means for securing the object of the decree, which was the sale after a fixed date of certain property, and to this end it attached the property on the ground that, if it were not attached, part of it would not on the date fixed be in existence. Next, it sold this part of the property, which proceeding appears to conflict with the terms of the decree ; but the property so sold was agricultural produce of a perishable nature, and its sale was made as much in the interests of the judgment-debtor as of the creditor. If the grain, &c., had not been sold, its value might have diminished by the time the two months were over, and the judgment-debtor would have been so much the worse off. The house which was attached was not included in the order fixing the sale after two months, so no objection can be made to that. No part of the attached property except the grain was ordered to be sold within the two months. The Court executing the decree was the same Court that issued it. I find that the objections to the execution order must fail."

In second appeal, the judgment-debtors again contended that the execution of the decree before the expiration of the two months provided by the decree should not have been allowed.

Mr. *A. Carapiet* and Lala *Lalta Prasad*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment :—

MAHMOOD, J.—The decree of the 17th January, 1884, provided that execution thereunder was not to take place before the expiry of two months. The decree exempted the person of the judgment-debtor, and was capable of execution only against the hypothecated property. The application for execution which commenced this litigation was made on the 14th February, 1884, that is, before the lapse of the period provided by the decree. We are of opinion that such an application should have been rejected by the lower Courts as premature. We decree the appeal, and set aside the orders of both the lower Courts, but, under the special circumstances of the case, make no order as to costs.

Appeal allowed.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

1884
December 4.

GANNU LAL (JUDGMENT-DEBTOR) *v.* RAM SAHAI (DECREE-HOLDER).*

Decree for possession of immoveable property—Execution of decree—Reversal of decree on appeal—Mesne profits – Civil Procedure Code, ss. 244, 583.

G obtained a decree against *R* for possession of a house, and in execution thereof obtained possession. On appeal, the decree was set aside by the High Court, whose decree did not direct that the appellant should be restored to possession and was silent as to mesne profits.

Held that with reference to s. 583 of the Civil Procedure Code, *R* was entitled to recover possession of the property in execution of the High Court's decree, but that, with reference to the decision of the Full Bench of the Court in *Ram Ghulam* v. *Dwarka Rai* (1), he could not, in execution of that decree, recover mesne profits.

ON the 10th September, 1880, Gannu Lal, the appellant in this case, sued Ram Sahai, the respondent, for possession of a house, and on the 23rd September, 1880, obtained a decree for possession of the same. This decree was affirmed on appeal, on the 24th December, 1880. On appeal from the appellate decree the High Court, on the 19th November, 1881, set aside both decrees and dismissed the suit. In the meantime, on the 13th April, 1881, Gannu Lal had obtained possession of the property, by execution of decree. Ram Sahai subsequently sued Gannu Lal for possession of the property and for mesne profits. He obtained a decree in this suit on the 26th July, 1883. This decree was set aside by the appellate Court, which directed him to proceed by way of execution of the High Court's decree. Ram Sahai accordingly made the application out of which this appeal arose. He applied in execution of the High Court's decree to recover possession of the property and mesne profits for the period he was out of possession. It was contended for Gannu Lal that, as the High Court's decree did not mention mesne profits, they could not be allowed, and further that that decree merely reversed the orders giving Gannu Lal possession, and did not give Ram Sahai possession, and the latter was only entitled to recover his costs under that decree and no more. Both the lower Courts disallowed this contention, and granted Ram Sahai's application both in respect

* Second Appeal No 56 of 1884, from an order of W. Young, Esq, District Judge of Allahabad, dated the 21st March, 1884, affirming an order of Pandit Indar Narain, Munsif of Allahabad, dated the 22nd December, 1883.

(1) *Ante*, p. 170.

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of delivery of possession and mesne profits. The lower appellate Court, after observing that, if the Courts executing the decree had the right to allow mesne profits, the amount allowed by the Court of first instance was not excessive, continued as follows :—

"Such right, I think, it does possess, for under cl. (*c*), s. 244, Act XIV of 1882, very general power is given to do what is requisite to give full effect to the decree. Now, I take it that the meaning of the High Court's decree, dated 19th November, 1881, was this, *viz.*, that Ram Sahai, not Gannu Lal, was to be deemed the rightful proprietor of the house, and that Gannu Lal's possession was to be reversed, and I take it further that the scope of this decree must be taken as applying from the beginning of the litigation on these facts between the parties; and as the High Court expressly reversed the orders of the two lower Courts, it must be taken to have reversed the consequent steps taken *pendente lite* by Gannu Lal to put into execution the orders of the said two lower Courts: that is, it must be taken to reverse the orders by which, on the 13th April, 1881, Gannu Lal had got possession of the house, and consequently it follows that from such date mesne profits are due to Ram Sahai (High Court appellant). And for similar reasons, I also hold that the lower Court's order putting Ram Sahai in possession of the house is right, and is a proper interpretation of the duty of the execution-department in execution of the High Court's order, dated 19th November, 1881."

On second appeal it was contended for Gannu Lal, appellant, that Ram Sahai was not entitled either to possession or mesne profits under the High Court's decree, that decree not awarding possession, but merely dismissing Gannu Lal's suit, and further being silent as to mesne profits.

Babu *Ram Das Chakarbati* and Munshi *Sukh Ram*, for the appellant.

Babu *Sital Prasad*, for the respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment :—

MAHMOOD, J.—It is admitted that the decree of 23rd September, 1880, in execution of which the appellant obtained possession of the property, made no provision as to mesne profits, and that

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he realized none in execution of that decree. The decree was finally reversed by this Court on the 19th November, 1881, and in executing that decree the lower Courts have restored the respondent to possession and also allowed him mesne profits.

So far as the question of possession is concerned, the order of the lower Courts was right with reference to s. 583 of the Civil Procedure Code. But the question of recovery of mesne profits is governed by the recent Full Bench ruling in *Ram Ghulam* v. *Dwarka Rai* (1), and we therefore partially decree the appeal and set aside the order of the lower Courts so far as it awards mesne profits to the respondent. Under these circumstances we make no order as to costs.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

1884 *December 5.*

SHAH MUHAMMAD AND OTHERS (DEFENDANTS) *v* KASHI DAS (PLAINTIFF).*

Declaratory decree—Abstract right—Cause of action—Costs.

A Hindu brought a suit in which he alleged that the Hindu community had acquired by long established custom an exclusive right to use for religious purposes a Ghat situate on the river Ganges, but that the Muhammadans were in the habit of interfering with the exercise of such right by bathing at the Ghat. He prayed for a declaration of the right, and for a perpetual injunction to be issued to the Muhammadans generally forbidding them to resort to the Ghat. No act of trespass was charged against any of the defendants. The defence was that the Muhammadans were entitled to use the place, and that their use of it did not cause any inconvenience to the plaintiff

Held that the suit was not maintainable, since the Court had no power to pass a decree against persons who had never interfered with the property in dispute, or to issue an injunction against the whole Muhammadan world; but that, inasmuch as the defendants had fought the case all along as if the suit were maintainable, and upon a false issue, both sides must pay their own costs.

THE plaint in this case stated that for many years there had existed in mohalla Mughalpura, in the city of Ghâzipur, a "ghât" on the river Ganges, known as the Pushto Ghat; that close to the ghât there was a "*sangat*" (place of worship) for holy men; that the Pushto Ghât and the "*sangat*" had been constructed by Hindus

* Second Appeal No. 1125 of 1883, from a decree of J. W. Power, Esq., District Judge of Ghâzipur, dated the 12th April, 1883, modifying a decree of Babu Nilmadhub Roy, Munsif of Ghâzipur, dated the 22nd December, 1882.

(1) *Ante*, p. 170.

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more than one hundred years ago, and for the purpose of management of the "*sangat*" the Hindus had created the office of "Mahant," and since the creation of that office the "*sangat*" had been managed by the "Mahant;" that the plaintiff was the "Mahant" and the "*sangat*" was under his management; that it was an ancient custom for "Hindus, holy men, Goshains and Brahmans," to resort to the Ghát for the purposes of worship and bathing, and performance of religious rites; that the repairs of the Ghát and "*sangat*" had been the duty of the "Mahant," and such repairs had been defrayed by subscriptions by the Hindus who used the Ghát for purposes of worship, &c.; that about twenty-five years before the institution of the suit the Ghát had been widened and in other ways improved by the plaintiff with moneys collected from Hindus; that the Ghát had not been used by the Muhammadans at any time; that in the year 1880 Muhammadans, mostly residents of mohalla Mughalpura, began to resort to the Ghát on the pretence of bathing; that this conduct led to a dispute between the Hindus and Muhammadans, which came before the Magistrate; that the Magistrate made an order that the Ghat should be open to the public from 11 A. M. to 4 P. M., and its use for the rest of the day should be confined to Hindus. The plaint then ran as follows:—

"(10). The Muhammadans, taking advantage of this order, which was passed contrary to the old established usage, gave trouble to the Hindus when engaged on the said Ghát in their worship according to their religion: interrupted the performance of the religious duties of the Hindus (who consider the offering of prayers at such a sacred place three times a day, *i.e.*, in the morning, at noon and in the evening, necessary and a part of their duty); and injured their right which they had enjoyed for more than a century, and to maintain which they frequently spent money out of their own pockets.

"(11). When this Ghát has of old been appurtenant to the "*sangat*" of the Hindus, and in exclusive enjoyment of the followers of the "*sangat*" and of other sects of the Hindus, the Magistrate had no power to interfere by fixing a time for the use of the Ghát by Musalmans, and by passing an order giving opportunity to those persons (who have a religion quite opposed to that of the

Hindus), to interrupt and inconvenience the Hindus in the performance of their religious duties.

"As it is not hidden from the Courts of Justice that by the frequent resort of the Musalmans to a place where the Hindus bathe, worship, and perform their religious ceremonies, great interruption is caused, and according to the Hindu religion both the water and the spot are considered polluted and unclean, hence—

"The plaintiff prays for the following reliefs:—(1). That a decree be passed for the establishment of the fact that the ghát known as the Pushto Ghát has been for a long time appurtenant to the "*sangat*," and has been built at the expense of the Hindus; and that by virtue of old established usage, it has been used exclusively by the Hindus for the purposes of bathing and the performances of other religious duties. (2). That after the fact having been proved that the Pushto Ghát has been built solely for the use of the Hindus, by their own exertions, and from their own pockets, and that only the Hindus have for a long time (more than twenty years) enjoyed the right of resorting to bathe and worship at the Ghát, without any specification of time, a perpetual injunction be issued to the defendants, and generally to all the Muhammadans, forbidding them from resorting to the Ghát under the pretence of bathing, and from causing any kind of interruption to the comfort and convenience of the Hindus, by polluting and fouling the water and spot, or from doing any other act. (3). That the orders of the Criminal Court, dated 26th August, 1880, and 4th January, 1881, which have been passed contrary to old established usage and right, and all the orders passed for fixing and specifying the time prejudicial to the plaintiff, be held invalid and inoperative. It may be noticed that Rs. 10 have been paid for establishment of right, Rs. 10 for the injunction, and Rs. 10 for the invalidation of the Criminal Court's proceedings. And as the relief sought, *i. e.*, that the Pushto Ghát be used for the purposes of bathing and performing the religious rites of the Hindus, is of such a nature that it is impossible to value it for the purpose of the jurisdiction of the Court, it has been valued at Rs. 10."

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The suit was instituted in the Court of the Munsif of Gházipur. The defendants, 58 in number, were all Muhammadans. One of them alone defended the suit. His defence was to the effect that the Ghát was built by Muhammadans; that Muhammadans were entitled to use the Ghát; and that Hindus were not in any way inconvenienced by the use of the Ghát by Muhammadans. The other defendants did not appear. Among the issues fixed by the Munsif were the following :—

"Was the Ghát in dispute built by Hindus alone or by Muhammadans alone?

"Was it built by Hindus or Muhammadans?

"Have the Muhammadans a prescriptive right to use the Ghát in dispute?

"According to Hindu ideas, will the Ghát be polluted if Muhammadans are allowed to bathe at it?"

A preliminary objection to the jurisdiction of the Munsif, regard being had to the value of the Ghát, was overruled by the Court.

The Court found, with reference to the issues set out above, that the origin of the Ghát was unknown; that the Ghát had been widened and improved at the cost of Hindus and Muhammadans alike; that both Hindus and Muhammadans had a prescriptive right to use the Ghát; and that it was not advisable to allow Hindus and Muhammadans to bathe at the Ghát promiscuously. The Court, with reference to these findings, made a decree directing that the plaintiff should be allowed the exclusive use of three-fourths of the Ghát and the Muhammadans of one-fourth, and the Ghát should be partitioned accordingly, and that the Magistrate's order should remain in force so long as the decree did not become final.

On appeal by the plaintiff, the lower appellate Court (District Judge) found that the Ghát had a Hindu origin; that it had been widened and improved at the expense of the Hindus alone; and that for upwards of twenty years the Ghát had been in the exclusive use of the Hindus. With reference to these findings, the lower appellate Court gave the plaintiff a decree as claimed.

The defendants appealed to the High Court.

Mr. *W. M. Colvin* and Mr. *C. H. Hill*, for the appellants.

Mr. *T. Conlan*, Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the respondent.

For the appellants it was contended that the Munsif had not jurisdiction to try the suit. The value of the ghát and "*sangat*" admittedly exceeds Rs. 1,000. Where the property in respect of which a declaration of right is sought exceeds Rs. 1,000 in value, the Munsif cannot make such a declaration. He cannot give a decree for possession of property exceeding that value, and therefore cannot declare the title to property exceeding that value.

[PETHERAM, C. J.—I should like to hear Mr. *Conlan* on the question whether there is a cause of action disclosed against the defendants. There seems to be none alleged].

Mr. *T. Conlan*.—The provisions of s. 30 of the Civil Procedure Code should have been followed in this case. The defendants should have been sued on behalf of the Muhammadan residents. The injunction sought would then be effectual. [PETHERAM, C. J —The suit does not seem to be maintainable]. Perhaps, as regards a declaration of right, the suit is maintainable, though not as regards the injunction. The declaration of right is claimed by reason of trespass on the property. [PETHERAM, C. J.—There is no act of trespass charged against the defendants or any of them. I think that the case has gone to trial under a misconception by the parties and the Court as to the real issues. The proper course would be to allow the appeal and order each party to pay their own costs]. It is doubtful whether the Munsif should have tried the suit. When the question is settled as to the Court which should try the suit, then the question as to whether there is a cause of action should be settled, and by that Court. I would suggest that, if your Lordships think the Munsif had no jurisdiction, the plaint should be returned for presentation to the proper Court. [PETHERAM, C. J.—I do not think this can be done. The point is whether a claim for a declaration of abstract right is maintainable.] If the suit is dismissed, it may be that the plaintiff will be barred from bringing a fresh suit. [PETHERAM, C. J.—I do not think so; a suit properly framed might be brought.]

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Mr. *C H. Hill*, in reply, contended that the objection that the Munsif had no jurisdiction was a good objection. It was taken from the very beginning of the litigation. If a good one, the appellants should be allowed their costs in all Courts.

The Court (PETHERAM, C. J., and BRODHURST, J.) delivered the following judgment :—

PETHERAM, C. J.—I am of opinion that this appeal must be allowed and the suit dismissed. The suit was brought to try a right to use a certain flight of steps in the city of Ghâzipur, which led from a street in the city to the river Ganges. The plaintiff alleges that the steps are his own private property, and that nobody else, without leave from him, has any right to use them. The defendants allege that the steps are not the property of the plaintiff; and further, that even if they were, the public have a right to use them. Now, if the suit had been properly framed, that issue should be tried. But the persons conducting the litigation mistook the powers which the Courts have; and instead of bringing a suit for trespass or asking for an injunction to prevent persons from trespassing, they brought a suit against persons who had never interfered with the steps at all, and prayed for an injunction against the whole world. Now, no Court in existence has or can have such powers, and therefore the suit must be dismissed. Then it is said that, this being so, the defendants should have their costs, and that would be proper if at the beginning the defendants had taken the point that the suit was not maintainable. But instead of doing so they fought the case all along as if the suit was maintainable, and upon a false issue. The litigation, owing to the mistake of both sides, has been wholly fruitless. I think therefore that both sides should pay their own costs.

Mr. *Hill* contended that the appeal should be allowed on the question of jurisdiction, and that his clients should be allowed their costs, the plea that the Munsif had not jurisdiction having been taken from the beginning of the litigation. It seems to me that the relief which the plaintiff claimed was valueless. Had he obtained a decree, it would have been worth nothing to him. Therefore it cannot be said that the relief sought by him exceeded in value the Munsif's pecuniary jurisdiction. If the plaintiff had sued in proper

form, the relief which might have been granted might have been very valuable.

BRODHURST, J., concurred.

Appeal allowed.

FULL BENCH.

1884 *December 6.*

Before Sir W Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield. Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* TAKI HUSAIN.

Defamation—Communication of defamatory matter to complainant only—Act XLV of 1860 (*Penal Code*), *s.* 499—"*Making*"—"*Publishing.*"

Held by the Full Bench (DUTHOIT, J., dissenting) that the action of a person who sent to a public officer by post in a closed cover a notice under s. 424 of the Civil Procedure Code, containing imputations on the character of the recipient, but which was not communicated by the accused to any third person, was not such a making or publishing of the matter complained of as to constitute an offence within the terms of s. 499 of the Penal Code.

THIS was an application for revision of an order of Mr. T. B. Tracy, Sessions Judge of Bareilly, dated the 18th July, 1884, affirming an order of Mr. J. Nugent, Joint Magistrate of Bareilly, dated the 10th July, 1884. It appeared that the house of the applicant, Taki Husain, was searched by the police without a warrant for stolen property. Thereupon the applicant sent by post to Basawan Singh, Inspector of Police and Kotwal of Bareilly City, in a registered cover, a notice, in Urdu, the terms of which were in effect as follows:—

"I, Taki Husain, ... hereby give notice to you, Basawan Singh, Kotwal of Bareilly, under s. 424 of the Code of Civil Procedure Code, that I will sue on the 12th March. 1884, for Rs. 100, as per account given below, to the effect that on the 5th January, 1884, you took away, or caused to be taken away, my property, worth Rs. 30, not in good faith, but in bad faith and maliciously. That property is now in your possession, and it was taken by you with the bad intention that you subsequently restore it to me on taking some money, or that you institute a false suit in the Criminal Court after procuring false witnesses. Rs. 70 are for damages on account of your defaming me by thus taking away my property. The damages claimed have been undercharged, be-

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cause you are so notorious a getter-up of false cases that there is but a very limited number of respectable persons who may be inclined to believe that is some truth in your thus taking away my property, and therefore injury to reputation is little. I give you also notice hereby that if you suborn any false witness against me, I will bring a separate suit against you for damages therefor. This notice is given because it is doubtful whether or not the kotwal of Bareilly city gets up false cases in his capacity as kotwal."

After receiving this notice, Basawan Singh, having obtained leave to do so from his superiors, prosecuted Taki Husain for defamation. With regard to the making of the notice, Taki Husain said on one occasion, on being examined by the Joint Magistrate, as follows:—"I wrote the notice produced, but do not understand it all ..... The notice was first written in English, and was translated by me." On a subsequent occasion he stated:—"The notice was written by Mr. Vansittart in English and translated by Ashaq Ali." Mr. Vansittart was Taki Husain's legal adviser, and Ashaq Ali was Mr. Vansittart's clerk; and it appeared that Mr. Vansittart wrote the notice in English and gave it to his clerk and Taki Husain to translate, and that when it was translated, Taki Husain despatched it by post to Basawan Singh.

The Joint Magistrate, by an order dated the 10th July, 1884, held that the notice was "palpably slanderous," and that although the question did not appear to have been definitely settled, whether the sending of defamatory matter to the person defamed alone amounted to an offence under s. 499 of the Penal Code, the communication to counsel and his clerk was a sufficient publication; and that the communication could not be regarded as privileged. He therefore sentenced the prisoner, under s. 500 of the Penal Code, to suffer simple imprisonment for one month, and to pay Rs. 250 fine, or, in default, to suffer a further term of imprisonment for one month.

On appeal, the Sessions Judge, by an order dated the 18th July, 1884, affirmed both the conviction and sentence. He observed:—"As to the contention that 'publication' was necessary, and that no person knew of the notice 'except accused, his counsel, and the clerk,' the accused was not charged with having commu-

nicated the libel to his own legal adviser, but to the complainant. The sending to the latter of a defamatory notice, which he was under the strongest conceivable obligation to bring to the notice of his superior officers, appears to me to amount to the offence made punishable by s. 499 of the Penal Code. Further, I am not aware on what authority it is contended that it is essential to constitute the offence of defamation that the libel should be published. The words in s. 499 are 'whoever makes or publishes, &c.'"

The application for revision came before PETHERAM, C.J., and DUTHOIT, J., who referred the following question to the Full Bench:—

"Assuming, for the purposes of argument, that the matter contained in the notice sent by the applicant to Basawan Singh was defamatory in the sense of Explanation 4 to s. 499 of the Indian Penal Code, and that none of the Exceptions provided under that section can be established, then was the action of the applicant in sending the notice in a closed cover by post to Basawan Singh such a making or publishing of the defamatory matter as to constitute an offence within the terms of s. 499 of the Indian Penal Code?"

Mr. *J. D. Gordon*, for the applicant. [PETHERAM, C. J.—You must not confine your argument to the question merely whether the despatch of the notice by post to Basawan Singh amounted to a publication. The order of reference was intended to cover everything that the prisoner did up to and including the despatch of the notice.]

The essence of the offence of defamation under the law of India is the injury to the individual attacked and not as in England the danger of a breach of the public peace. But here the matter complained of was made known to the prosecutor alone, and his reputation could not be injured, within the meaning of *Explanation* 4 of s. 499 of the Penal Code, when no other person was aware of the attack made upon him. It was in the power of Basawan Singh to prevent all possibility of injury by destroying the notice received by him.

[DUTHOIT, J.—Was it not his duty as a public servant to show the notice to his superiors?] There was no legal obligation on him to do so. [PETHERAM, C. J.—The *Illustrations* to s. 499 refer

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only to communications made to a third person. This seems to suggest that the communication of defamatory matter merely to the person attacked is not a publication within the meaning of s. 499. OLDFIELD, J.—It may be said that the petitioner intended to bring a suit, and must have known, when he sent the notice, that in that suit the notice would be given in evidence.]

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the Crown.—There is sufficient evidence to show that the petitioner "made" the imputation upon the character of the complainant. The clerk, who translated the notice before it was sent, was a third person, and the communication to him amounted to publication. Illustration (2) of art. 270 of Stephen's *Digest of the Criminal Law* shows that the posting of a libellous letter is in itself a publication. [PETHERAM, C. J.—That illustration belongs to a class of cases which relate to the subject of *venue*, and the question which arose in these cases was in which county the crime was committed, the county from which a letter was sent, or that in which it was received.]

The following judgments were delivered by the Full Bench :—

DUTHOIT, J.—Assuming that the notice contained defamatory matter within the terms of Explanation 4, s. 499 of the Indian Penal Code, and that the communication was not privileged, and taking the facts to be as they were found by the Magistrate, *viz.*, that the notice was concocted between Mr. Vansittart and the petitioner, that, after it had been written in English, the petitioner helped to translate it, and himself sent it by post to Basawan Singh, I am of opinion that the petitioner committed the offence described in s. 499 of the Indian Penal Code, both by "making" and by "publishing."

Before I proceed to discuss the question further, I must say a few words upon a point which was, I consider, not sufficiently debated at the hearing. It was assumed at the hearing that the English Common Law offence of libel was something essentially different from the offence of defamation as set out in the Indian Penal Code. And this was said to be so because the reasons for making slanderou imputations indictable were different under the two systems. These statements are, in my opinion, far too

broad; and, so being, are not consonant with fact. The material points of difference between the English Criminal Law of defamation are, I take it, the following:—

I.—Whereas the English Common Law makes punishable—

(1) libels on private individuals,
(2) libels on bodies of men and corporations,
(3) libels on official persons, } Specially reprehensible.
(4) libels on foreigners of distinction, } Specially reprehensible.
(5) libels on the dead,
(6) seditious libels,
(7) obscene and blasphemous libels,

the Indian Penal Code provides elsewhere for seditious and obscene and blasphemous libels; and whilst providing in its XXIst Chapter for the punishment of the other libels set out above, marks none of them in particular as deserving special reprehension.

II.—Whereas the English Law does not, except in certain special cases, make defamatory words, not reduced to writing, punishable, the Indian Law makes them punishable.

III.—Whereas the Indian Law constitutes the "making" of a libel an offence distinct from the "publishing," the English Law has not as yet made this distinction, but treats the "making" as an attempt to commit, or as an abetment of the substantive offence of "publishing." The language of the Indian Statute (s. 499 of the Indian Penal Code) is "*whoever makes or publishes,*" the language of the English Statute (6 and 7 Vic., cap. 96, ss. 4 and 5) is "*if any person shall maliciously publish.*"

The statement that the English Law makes the offence of publishing a defamatory libel penal, solely because of the tendency of such libels to provoke breaches of the peace, and that the Indian Law disregards this tendency as a reason for constituting the offence, is, in my opinion, doubly inaccurate, if written or printed libels are referred to. I can find in the Statute Law of neither system any foundation for it at all; and, so far as I am aware, there are no Indian cases in which the question has been raised. If restricted to words *spoken* to private individuals, the statement (*cf. Russell*

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on Crimes, 4th ed., Vol. I, page 343*), so far as the English Law is concerned, is no doubt correct, but we are not now engaged with defamatory matter conveyed by words spoken.

Chapter XXI of the Indian Penal Code, forming, as it does, part of a Code, has no preamble setting out the reason for its enactment, but the Indian Law Commissioners, in para. 396 of their Report, dated the 24th June, 1847 (Parl. Papers, Indian Law Commission, 1848, No. 330, page 48), write:—"We shall only observe that it would be more proper to describe the Code as disallowing the tendency to irritation not as any criterion, but as the *sole* criterion of criminality in defamation. It makes defamation an offence independently of any such tendency, because defamatory inputations of the worst kind may have no tendency to cause acts of violence, but the tendency of calumnious imputations to provoke breaches of the peace is undoubtedly one of the reasons for making defamation an offence." The preamble of "Lord Campbell's Act" (6 and 7 Vic., cap. 96), the statute under which libels defamatory of private individuals are now punishable in England, runs thus:—"For the better protection of private character, and for more effectually securing the liberty of the Press, and for better preventing abuses in exercising the said liberty, be it enacted, &c." The English and American text books treat their tendency to create breaches of the peace as the *principal*, but not as the *sole* reason why libels against individuals are indictable. The indictment, according to the form commonly used in England, charges the libel as "against the peace of our Lady the Queen, her Crown and dignity;" but it also charges it as "being to the great damage, scandal, and disgrace of J. N., and to the evil example of all others in the like case offending." I feel myself then at liberty to use English and American cases by way of throwing light upon the points now under discussion. And I would further remark, that

* The author is treating of libels on private individuals, and the passage runs thus:—"Words spoken, however scurrilous, even though spoken personally to an individual, are not the subject of an indictment unless they directly tend to a breach of the peace, as if they convey a challenge to fight. But words, though not scandalous in themselves, if published in writing, and tending in any degree to the discredit of a man, have been held to be libellous." Defamatory words uttered to Magistrates in the execution of their duty, or affecting them directly in their office, which bring the administration of justice into contempt, are indictable without regard to their tendency to provoke a breach of the peace.—*cf.* Russell, 4th ed, Vol. 1, p. 342.

it is from the English books that the meaning of many of the expressions used in s. 499 of the Indian Penal Code must be gathered; for an examination of the entire section, with its explanations and exceptions, shows that its phraseology is not that of the old Regulations, but that of the English books. The language of Explanation 4, for instance, is practically the same as that used in the English text books to describe the cases in which an action will lie without laying special damage, being those in which (*cf.* Arch., 19th ed., p. 917) an indictment will also lie.

In this part of India the offence now called defamation used to be called "calumny." The offence was not defined in the Regulations, but its punishment was provided in s. 8 of Bengal Regulation IX of 1793 (VI of 1803). In the Indian Penal Code, as originally framed, the offence of defamation was thus defined:— "Whoever, by words, &c., attempts to cause any imputation concerning any person to be believed in any quarter, knowing that the belief would harm the reputation of that person in that quarter, is said," &c.

The words of s. 499 of the Indian Penal Code with which we are now concerned are the following:—

"Whoever, by words intended to be read, makes or publishes any imputation concerning any person, intending to harm the reputation of such person, is said to defame such person."

That the words of the notice were intended to be read is so plain that I shall not stay to discuss the point.

It remains to be seen—

(1) Whether the petitioner "made" the notice.

(2) Whether he "published" it.

(3) Whether, in making or publishing it, he had, or had not, the intention of harming the reputation of Basawan Singh.

I will consider each of these points in order.

(1) "If one man repeats a libel, another writes it, and a third approves what is written," says Russell, quoting Bacon's Abridgment, "they will all be makers of the libel." And if the writing now in question was prepared in the way in which the Magistrate has found it to have been prepared, there can, I think,

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be no doubt, with reference to the terms of ss. 107 and 114 of the Indian Penal Code, that the petitioner is as much liable to conviction for "*making*" the imputation as he would have been had he been the sole person concerned in composing and committing to writing the defamatory letter.

(2) "*Publishing*," as used in the law under consideration, is clearly a word of second intention. It has come down to us from the Roman Law, and takes the place of *edere*. What its legal signification is was considered in 1820, in the celebrated case of the *King* against *Sir Francis Burdett*, by four Judges (Best, Bayley, Holroyd, JJ., and Abbott, C. J.); and I have not been able to find that the opinions then expressed regarding it have since been overruled.

The defendant had been convicted, but it was urged, *inter alia*, in support of a rule for a new trial, that the mere posting of a letter containing libellous matter was not a publication. The addressee was a third person (the libel was a seditious libel), but it had, in 1798, been laid down in *Phillips* v. *Jansen* (1) that a libel sent to the person libelled might be the object of an indictment. Best, J., said (5 B. and Ald. at p 126) :—"It is assumed that publication means a manifestation of the contents. I deny that such is the meaning of the word 'publication.' In no part of the law do I find that it is used in that sense. A man publishes an award, but he does not read it. Again, he publishes a will, but he does not manifest its contents to those to whom he makes the publication; he merely desires the witnesses to take notice that the paper to which they affix their different attestations is his will. So in the case of a libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the *locus pœnitentiæ*; his offence is complete; all that depends on him is consummated, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. .... The description of a libeller in our indictments seems to me to have been borrowed from the

(1) 2 Esp. 624.

Civil Law, and I agree that the word *edo* is represented by our word *publish;* but I deny that *edere* means to manifest the contents of a paper. Both in the Roman classics and law books it means the act of *delivery*, which precedes the manifestation of the contents; and the subsequent manifestation is expressed by some other term, as *exponere* or *manifestari.*" Holroyd, J., said (5 B. and Ald. at p. 143):—"In 5 Co. Rep. 126 A., it is laid down that a scandalous libel may be published *traditione* when the libel, or any copy of it, is *delivered* over to scandalize the party. So that the mere delivery over or parting with the libel with that intent is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word *publishing* is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing .....In the cases of wills and awards, they are constantly made and published without the contents being made known even to the witnesses in whose presence they are published. So that the making known the contents is not in some cases at least, *ex vi termini*, essential to the constitution of an act of publishing."

Bayley, J., gave no opinion upon the point raised, as he considered that the question of fact, whether the defendant had or had not actually posted the letter containing the libel, or caused it to be posted, was one upon which a special verdict should have been taken.

Abbott, C. J., said (5 B. and Ald. at p. 160):—"It was further contended that the word publication denotes an actual communication of the contents of the writing by the publisher to some other person, and we were referred to dictionaries for the sense of the word publication. But in the law, as indeed in other sciences and arts, some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus in the language of the law, we speak of the publication of a will, and the publication of an award, without meaning to denote by that word any communication of the contents of these instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or

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award. In like manner the publication of a libel does not, in my opinion, mean an actual communication of the contents of the paper."

There can then, in my judgment, be no doubt that the posting of the defamatory matter by the petitioner was a "publishing."

(3) In considering the third point, it is immaterial whether the petitioner both made and published, or only made or published, the defamatory matter. Neither the making, nor the publishing, was an offence, unless it was made with the intention of harming the reputation of Basawan Singh. And it is contended on behalf of the petitioner that he had no such intention.

The form which was given to this contention in the written grounds of revision was the following:—

"It is proved that the words in the notice sent by your petitioner were suggested and written by a competent legal adviser, and consequently it is not right to infer that the allegation they contain was made maliciously and with intent to defame."

And it has also been suggested—

(*a*) That under no circumstances can a writing which is sent in a closed cover to the person whose reputation is aspersed by it be said to be sent with intent to defame; for if on receiving it that person at once destroys it, defamation by it becomes impossible.

(*b*) That the Courts, both in England and in India, have held this to be so.

As to the plea taken in the written grounds of appeal, I observe that if Mr. Vansittart had supposed the despatch of the notice to be likely to result in the conviction and punishment of his client, it is improbable that he would have allowed it to be despatched; but it is very probable that Mr. Vansittart suggested the form in which the writing was despatched as one which would be absolutely privileged. There is therefore, in my opinion, no force in this contention.

Regarding the former of the verbal pleas, I remark that if it were certain that a person slandered by a writing sent to him would be sure to destroy the writing, and thus prevent his reputation being harmed by it, the plea would be unanswerable. But

is it certain that this is the course which every person slandered would, or with reference to the circumstances of his position, could adopt? I think not. It is, I think, easy to conceive of cases in which the probabilities would lie in the opposite direction. Take, for instance, the case (a by no means improbable case in this country) of a spiteful master, from whose service an illiterate servant has asked for his discharge, and a certificate of good character on leaving; of the master saying—"All right, be off; I haven't time to write a certificate now, but give me your address, and I'll send one after you." Afterwards the master, knowing that what he was writing was false, and that the natural course for the servant to follow on receiving the certificate would be to take it to some one to be read, or direct to his next employer, sends in a closed cover to the servant a certificate in which he describes the servant as a rogue and a thief. I cannot doubt that the offender in such a case would be punishable for defamation. S. 114 of the Indian Evidence Act, 1872, provides that the Court "may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case." And it seems to me impossible to lay down a hard-and-fast rule of the nature contended for on behalf of the petitioner. It seems to me possible to conceive that in some cases the sender of slanderous matter to the person slandered might have no reason to suppose that the receiver would let it go further; but, on the other hand, it seems to me just as possible to conceive that in some such cases the slanderer might have every reason to suppose that the receiver would be compelled, by the exigencies of his official position or other causes, to allow the slander to become known to others; and when the sender has "reason to believe" that will be so, he surely, as it seems to me, brings himself—all other conditions being satisfied—within the terms of s. 499 of the Indian Penal Code.

I now come to the latter of the verbal pleas, *viz.*, that the Courts, both in England and in India, have held a libel addressed to the person slandered not to be within the grasp of the law. The only Indian cases in which the point has been directly raised

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which were cited, and I have been able to find, are *Komul Chunder Bose* v. *Nobin Chunder Ghose* (1) and *Mahomed Ismail Khan* v. *Mahomed Tahir* (2). The latter case merely follows and approves the former, and the report is so meagre that but little can be ascertained from it. In *Komul Chunder Bose* v. *Nobin Chunder Ghose* (1) Macpherson, J., said :—" I am of opinion that this appeal ought to be dismissed, because I think that the judgment of the lower appellate Court is substantially right. The suit is brought for damages for defamation of character. The defamation is contained in a letter written and sent by the defendant to the plaintiff. The damage alleged is the injury to the plaintiff's feelings ; and in the plaint no allegation is made of any publication of the libel beyond its being stated that the letter was sent to, and read by, the plaintiff himself. It appears to me that the plaintiff's case is deficient in several respects. In the first place it is not proved that there was any publication, for it is admitted that the letter was addressed to the plaintiff himself, and it was not proved that the letter was read by anybody excepting the plaintiff. It is now said that it might have been proved that the letter was in fact received in the first instance and opened by the nephew of the plaintiff. Admitting, however, that the plaintiff could have proved this, the fact of the letter being opened by the nephew, or by any one else, would not constitute publication by the defendant, unless the plaintiff could have gone further and also proved that the defendant, when he despatched the letter, knew that in the ordinary course of business in the plaintiff's house the letter would be opened and read by the nephew or by some one else other than the plaintiff himself."

In holding that the sending of the writing to the party himself, without proof that it was read by any other person, did not constitute publication, the learned Judge was no doubt following the case of *Phillips* v. *Jansen* (3), and in suggesting that if it had been shown that the defendant knew it to be the ordinary course of business in the plaintiff's house for letters to be opened and read by the plaintiff's nephew, or some one else, there would have been publication, he was probably following *Delacroix* v. *Thevenot*

(1) 10 W. R., 184. (2) N.-W. P. H. C. Rep., 1874, p. 38.
(3) 2 Esp., 624.

(1). But all these cases (both English and Indian) are cases of civil actions; and in *Phillips* v. *Jansen* (2) it was said that delivery to the party libelled was a sufficient publication to support an *indictment*. The English and American law upon the point seems to be settled. In *Russell on Crimes* (1st ed., Vol. I., p. 356), it is said :—" Proof that the libel was contained in a letter addressed to the party, and delivered into the party's hands is sufficient proof of publication upon an indictment or information;" and in a foot-note Mr. Greaves brings out the difference in this respect between an indictment and an action. Mr. Bishop (Bishop's *Commentaries on the Criminal Law*, Boston, 1877, Vol. II, p. 576), writes :—" The full criminal offence is committed by sending the libel to the one libelled, though it reaches the ears of no third person. But for this the civil action cannot be maintained."

It has been contended, as has been noted above, that the reason for this difference between the law applicable to a civil action and to a criminal indictment is, that in the criminal indictment the law concerns itself solely with the tendency of a defamatory libel to provoke a breach of the peace, and that the danger of that result is as great when the libel is communicated to the person libelled as it is when the libel is communicated to others as well. I have already indicated my opinion that this contention is erroneous. And I find that in *Reg.* v. *Brooke* (3) (a case of 1856, and so far as I have been able to ascertain, the latest case on the point) on the trial of an indictment for libel, the only evidence of the publication of which was the sending it in a letter to the prosecutor himself, and the receipt of it by him, it was held (against the contention of the counsel for the defendant, that it was absurd to say a man was injured in his reputation by a letter addressed only to himself) that there was sufficient evidence to go to the jury, although the indictment contained no allegation of an intent or a tendency to provoke a breach of the peace. So also in an American case cited by Mr. Bishop (*ibid*, p. 579) it was held that a letter by a man to the wife of another (in a State where adultery is felony), implying that she had acted libidinously towards the writer, and had invited him to have adulterous inter-

(1) 2 Starkie, 63. (2) 2 Esp, 624.
(3) 2 Cox, C. C. 251.

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course, the object of the letter being to insult and abuse her, debauch her affections, alienate them from her husband, entice her into adultery, and bring her into disgrace and contempt, was an indictable libel. And in an Indian case which was cited to the Chief Justice and myself at the first hearing, *viz.*, *Shepherd* v. *The Trustees of the Port of Bombay* (1), Green, J., remarked :—The sending of defamatory matter to the person himself who is affected by it, though it may form a ground for criminal proceedings, is, so far as a civil action for damages is concerned, protected, and does not constitute a cause of action." There seems to me to be good reason why this should be so, independently of the tendency of slander to provoke a breach of the peace. In a civil action, with reference to the damage caused to the plaintiff, "*actus facit reum.*" In a criminal action "*actus non facit reum, nisi mens sit rea.*" It is the evil mind which makes the defendant liable, and not the actual damage caused by the act. The reason of the existence both of the civil and of the criminal action for slander is the same, the necessity, namely, of providing a remedy to which an injured person may resort, and may thus be prevented from avenging himself; but in the one case, if the libel passes direct to the person libelled, the damage for which compensation is given must, if sustained, have been to some extent caused otherwise than by the act of the defendant—the plaintiff must, in fact, have contributed to it. In the other case the evil mind which the law punishes is made apparent, and the guilt of it is fixed as soon as the "arrow is shot."

A man is held in law to intend the natural consequences of his acts, and in considering the case now before us, we must apply the provisions of s. 114, Act I of 1872. So doing, I note that the petitioner asserts his intention to have been to bring a suit as declared in the notice; that if the suit had been brought, the first thing to have been proved in it would have been the notice itself; that if a suit had been brought, it would have been brought against Basawan Singh on account of a thing purporting to have been done by him in the execution of his duty; that Basawan Singh would surely have moved Government to defend the suit on his behalf; that the officer of Government to whom such

(1) I. L. R., 1 Bom., 477.

application might have been made, would surely have asked Basawan Singh if notice of the action had been received, and on being told that it had been, would have called on Basawan Singh to produce it; that knowing that this would be so, and having no reason to suppose that a suit would not be brought against him, Basawan Singh would naturally think it best to show the notice at once to his superior officers; that, as a fact, this is what Basawan Singh did; and that the appellant is a man of intelligence and position, with means of knowing what would be the line of conduct which Basawan Singh would be likely to adopt.

Upon this view of the case, I find it impossible to doubt that, in sending the notice to Basawan Singh, the petitioner intended to harm the reputation of Basawan Singh. My reply therefore to the question put to the Full Bench must be, as indicated at the outset of these remarks, that, assuming the points conceded for the sake of argument by the order of reference, the petitioner has been rightly convicted under s. 499-500 of the Indian Penal Code.

MAHMOOD, J.—I regret that I am unable to agree with my brother Duthoit in the conclusion which he has arrived at upon the question referred to us. I take it that in the Full Bench we are not in possession of the whole case, so far as regards the minute details of evidence, or as regards the punishment which has been inflicted. The question before us is an extremely limited one, namely, whether or not a libellous communication made only to the person whose character is attacked amounts to the offence of defamation as defined in s. 499 of the Indian Penal Code? I am anxious to say that the question we have to consider is so limited, because the paper-book shows that the accused in the present case was never tried for any other publication than that which consists in making a communication to the prosecutor himself. Now, in the first place, without considering it necessary to refer to the English authorities, I take it that, according to both the English and the Indian Law, communication of libellous matter to the complainant only is not sufficient to sustain a civil action. So far as criminal indictments are concerned, the rule of English Law as to publication seems to be similar to that in civil cases, but subject to an important proviso, namely, that

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where defamatory matter has been communicated to the prosecutor only, and it is established that such communication was made with the object of provoking the prosecutor to commit a breach of the peace, the libel would amount to a criminal offence. If it could not be proved that the publication to the prosecutor only was intended or calculated to provoke a breach of the peace, there would be nothing to support an indictment, even though the tendency of the libel be to vilify the prosecutor and degrade him socially or professionally, if the libel were communicated to third parties.

Now, to arrive at a conclusion as to the law of India upon this point, we must look to the terms of s. 499 of the Penal Code, read as a whole, with all the explanations, illustrations and exceptions which it includes. In the first place, the words in the body of the section itself must be considered:—"Whoever, by words, either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." This is the substantial part of the section, and it appears to me that the most important words in it are: "intending to *harm*, or knowing or having reason to believe that such imputation will *harm* the reputation of such person." I lay special stress upon the word "harm," because the words "makes or publishes" are governed by the meaning which we must attach to "*harm*." Now, the meaning which should be attached to "harm" is not the ordinary sense in which the word is used, because a special meaning is given to it by the statute, and I feel convinced that if we interpreted the expression in the ordinary way, we should interpret it erroneously. This is shown beyond a doubt by Explanation 4, which provides that—"No imputation is said to *harm* a person's reputation unless that imputation, directly or indirectly, in the estimation of *others*, lowers the moral or intellectual character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful." This Explanation convinces me that by

"harm" is meant imputations on a man's character made and expressed *to others*, so as to lower him in their estimation, and that anything which lowers him merely in *his own* estimation, certainly does not constitute defamation. Now, in the case which has been referred to us, taking the reference as it stands, there were imputations communicated to the prosecutor only, and therefore they cannot be treated as defamatory. The letter could not have injured the prosecutor in the estimation of others, and of course it is not likely that it injured him in his own estimation, and I am unable to hold that a man's opinion of himself can be called his *reputation*. Further, the words "*directly or indirectly*" in Explanation 4, mean that the person defamed must either be abused in express terms, or the wording of the communication must convey such imputations as any person reading it must understand to impute misconduct or bad character. The words cannot, in my opinion, be understood to mean that the person libelled should himself be the direct means of publishing the libel to others. Taking the question before us as limited in the manner which I have described, I am of opinion that in the present case the act of the petitioner was not such a "making" or "publication" as could "harm" the prosecutor in the sense given to that word in Explanation 4 of the section.

To return for a moment to the English Law on the subject, the essence of libel as a criminal offence is its tendency to provoke a breach of the peace. This is the turning-point of the offence in cases where the matter complained of is communicated to the prosecutor alone. Now s. 504 of the Indian Penal Code meets such a case exactly. It provides that "whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both." This provision corresponds precisely with those cases in which, under the English Law, defamatory matter published to the prosecutor alone would be indictable as libellous.

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In the present case the accused was not tried for publishing the libel to Mr. Vansittart or to the clerk, and even if he had been so tried, he might possibly have pleaded that the communication made by him was privileged, and could not be proved, and he might have raised other pleas in his defence. But with such questions as these we are not now concerned. The charge was made solely in respect of the communication of the letter to the prosecutor, upon whom it was incumbent to prove that the letter was so made or published as to do him "harm" within the meaning of s. 499 of the Penal Code. I hold that, taking the case as it has been referred to us, no such charge has been established. If the accused were charged with having intended that the letter sent by him should cause a breach of the peace, he might have been punishable under s 504, but it has practically been admitted that he had no intention of the kind. My reply to the reference, therefore, is that the elements of the offence punishable under s. 499 of the Penal Code have not been proved by the prosecution, and that the question must be answered in the negative.

BRODHURST, J.—I also am of opinion that the act of the petitioner was not such a making or publishing as is contemplated by s. 499 of the Indian Penal Code.

OLDFIELD, J.—We have to determine the question before us only with reference to the provision in s. 499 of the Penal Code, and to no other law. Where the words containing the imputation are in writing, it is necessary, in order to constitute the offence of defamation under s. 499 of the Penal Code, that the maker of the imputation shall intend that the words shall be read, that is, read by some other person than the person defamed, or, in other words, that they shall be made public, for the essence of the offence of defamation in the Penal Code is the intention to harm reputation, and that necessarily requires publicity to be given to the imputation. The offence is not dependent on there being provocation to cause a breach of the public peace, that offence being otherwise provided for in the Code.

We have to determine this intention from the facts in each case. Where the only act is to send a letter under a closed cover

to a person, containing imputations against him, the intention to make public its contents so as to harm his reputation cannot be inferred, and I see no difference in this case, where the writing took the form of a notice of an action, and no more was done than to send it to the complainant under a closed cover. Any publicity given to its contents, and consequent harm to reputation, was or could be only by the act of the complainant, and not by that of the accused. It rested with the former to publish the contents or not; the latter might have taken steps in other ways to give it publicity, but did not; and the circumstances will not justify us in holding that he intended that the contents should be made public, and so harm the reputation of the complainant. In my opinion, therefore, the answer to the reference should be in the negative.

PETHERAM, C. J.—As one of the Judges who referred this case to the Full Bench, I wish to say that the words in the order of reference, "in sending the notice in a closed cover by post to Basawan Singh," should be struck out; and the question will then stand whether the whole action of the appellant did or did not constitute an offence under s. 499 of the Penal Code. That was what we intended to refer to the Full Bench.

In my opinion there was no evidence against the defendant of the commission of any offence whatever. The question before us is a very small one—simply the construction to be placed upon s. 499. Before the Penal Code was passed, there was under the native laws no such offence as slander, and the offence was in fact created by s. 499. This is in itself a short section, but it contains many illustrations and exceptions. If we look at these illustrations, we must observe that they all deal with such communications only as are made to third persons. So also each of the exceptions relates to such communications, and not to publications only to the person defamed. It is therefore no violent presumption that the framers of the Penal Code did not intend to create a new offence in that sense. The only question is, whether the terms of the section are so distinct as to make the action of the appellant in this case a crime. The only way in which you can make it a crime is to hold that by doing something which makes, or is likely

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to make, the prosecutor *harm himself*, the provisions of s. 499 are violated. But the section itself does not say so. Here no imputation was made except to the policeman himself How could such an imputation possibly injure his reputation? A man has no "reputation" to himself, and therefore the section does not make an act of this nature a crime. It follows that the sending of the letter was not "making" or "publishing" an imputation within the meaning of s. 499. As to the rest of the charge against the prisoner, there was no reliable evidence to support it. The only evidence at all consisted of two statements made by the prisoner in the presence of the Magistrate, but it is only by straining the language of these statements that they can be regarded as confessions, for it is clear that the prisoner did not mean to say either that he composed the letter himself, or that he was aware of its contents. I am therefore of opinion that the conviction should be set aside; that the fine which has been paid should be remitted; and that, if any further reparation to the prisoner is possible, such reparation ought to be made.

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Before Sir W. Comer Petheram, Kt, Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr Justice Mahmood, and Mr. Justice Duthoit.

TOTA RAM AND OTHERS (PLAINTIFFS) *v.* HAR KISHAN AND OTHERS (DEFENDANTS) *

Res judicata—Civil Procedure Code, s. 13—Act XIX of 1873 (Land-Revenue Act), ss 56, 62, 64, 241 (g).

Held that an order by a Settlement Officer directing that certain persons should be recorded as the sub-proprietors of certain land, as they claimed to be, and not as lessees, as certain other persons asserted that they were, did not operate as *res judicata* in a suit by the latter persons against the former for a declaration that the former were not sub-proprietors of the land, but lessees thereof, the Settlement Officer not being competent, under Act XIX of 1873 (N.-W. P. Land-Revenue Act), to try such a question of right.

THE plaintiffs in this case stated in their plaint that they were zamindars of mauza Panwari, pargana Itimadpur, zila Agra, in which there was a hamlet, 180 bighas 10 biswas in area. The defendants were the lessees of the hamlet, but they applied to the Settlement Officer to be recorded as its inferior proprietors. The

* Second Appeal No. 126 of 1884, from a decree of J. C. Leupolt, Esq., District Judge of Agra, dated the 31st July, 1883, affirming a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Agra, dated the 22nd June, 1882.

plaintiffs opposed this application, but their objections were overruled, and defendants were ordered to be recorded as inferior proprietors of the village. Upon these allegations the plaintiffs claimed a declaration that the defendants were not inferior proprietors of the hamlet, but merely lessees thereof. The defendants contended that the question whether they were inferior proprietors or lessees of the hamlet was *res judicata*, with reference to the order of the Settlement Officer. The Court of first instance (Subordinate Judge of Agra) allowed the defendants' contention and dismissed the suit, holding that the suit was barred by s. 13 of the Civil Procedure Code. In so holding, it relied on *Rup Singh* v. *Sukhdeo* (1). On appeal by the plaintiffs, the lower appellate Court (District Judge of Agra), having regard to the decision in the same case, affirmed the decree of the Court of first instance.

In second appeal, the plaintiffs contended that "s. 13 of the Civil Procedure Code was no bar to the institution of the present suit to establish a right to the property."

The Division Bench (STRAIGHT, Offg. C. J., and MAHMOOD, J.) hearing the appeal referred the question, whether the suit was barred by s. 13 of the Civil Procedure Code, to the Full Bench, stating, in the order of reference, as follows:—

"We should have scarcely felt any difficulty in disposing of this appeal, but for a ruling of a Division Bench of this Court in *Rup Singh* v. *Sukhdeo* (1) on which both the lower Courts have relied in support of the view that the order of the Settlement Officer, directing that the defendants were to be recorded as inferior proprietors of the hamlet in suit, operated as *res judicata* so as to bar the present suit. The ruling is undoubtedly applicable to the present case, but it is in conflict with certain other published and unpublished rulings of this Court, of which *Birbal* v. *Tika Ram* (2) is an illustration. On the other hand, in the case of *Shimbhu Narain Singh* v. *Bachcha* (3) a Full Bench of this Court was evenly divided on a cognate question."

The *Senior Government Pleader* (Lala *Juala Prasad*) for the appellants.—The order of the Settlement Officer was made under

(1) Weekly Notes, 1882, p. 111. (2) I. L. R., 4 All., 11.
(3) I. L. R., 2 All., 200.

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ss. 62 and 64 of the N.-W. P. Land Revenue Act, 1873. All orders under those sections are made on the basis of possession. The Settlement Officer is not authorised under those sections to try questions of title. If he tries such a question, his decision is not binding.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondents. The Settlement Officer's order was made under s. 56 of the Land-Revenue Act. The order could not be made without determining the *status* of the plaintiffs in this suit. The Settlement Officer was competent to determine that *status*, and his order is binding. Under s. 95 (*g*) no Civil Court can exercise jurisdiction in respect of the matters provided for in s. 56.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—The matter in issue in this suit is, whether the defendants are inferior proprietors or lessees of certain land. This same question arose before the Settlement Officer. He decided that the defendants were inferior proprietors and not lessees. If he had jurisdiction to try this question, the matter is *res judicata*. S. 13 of the Civil Procedure Code says :—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." In the first place, there has been no litigation properly so called, and secondly, there was no competent Court. The Settlement Officer is said to have acted under ss. 62 and 64 of the Land Revenue Act. But those sections show that the entries are to be made on the basis of possession ; they are to be entries of existing rights, there being no dispute as to rights. There is no provision in the Act which gives the Settlement Officer power to settle rights. His decision in this case is not, therefore, a binding decision. In my opinion, s. 13 of the Civil Procedure Code is not a bar to the institution of the present suit.

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MAHMOOD, J.—I am of the same opinion as the learned Chief Justice. The dispute between the parties to this case constitutes a suit of a civil nature within the meaning of s. 11 of the Civil Procedure Code, and would therefore be the subject of adjudication by the Civil Courts, unless it is shown that its cognizance is barred by any legislative enactment. The learned pleader for the respondents endeavoured to show that the matter of the dispute fell under the purview of cl. (*g*) of s. 241 of the Revenue Act, and that as the Settlement Officer must be taken to have acted under s. 56 of that Act, his order was within jurisdiction, and formed an adjudication which would bar the present suit under s. 13 of the Civil Procedure Code. The learned pleader also referred to ss. 62 and 64 of the Revenue Act, but none of these sections can either be understood to bar the jurisdiction of the Civil Courts in respect of disputes of this nature, or to confer power on Settlement Officers to adjudicate upon rights such as are in issue in this litigation. To substantiate the plea of *res judicata* it is essential to show that the former adjudication was by a Court of competent jurisdiction; but the Settlement Officer cannot be regarded as such a Court, and there was no adjudication.

For these reasons I am unable to agree in the rule laid down in *Rup Singh* v. *Sukhdeo* (1) on which both the lower Courts have relied, and my answer to the question referred to us is in the negative.

OLDFIELD, BRODHURST, and DUTHOIT, JJ., concurred.

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December 13.

Before Sir W Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr Justice Mahmood, and Mr. Justice Duthoit.

RAMJIWAN MAL AND ANOTHER (PLAINTIFFS) *v.* CHAND MAL AND OTHERS (DEFENDANTS).*

Suit for dissolution of partnership—Winding-up—Jurisdiction—Act IX of 1872 *(Contract Act), s.* 265—*Civil Procedure Code, ss.* 11, 213, 215, *sch IV, Form* 113.

The ordinary Civil Courts have jurisdiction to try a suit for dissolution of a partnership, their jurisdiction to try such suits not being ousted by s. 265 of the Contract Act, 1872

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* Application No. 334 of 1884, for revision under s 622 of the Civil Procedure Code of an order of H. D. Willock, Esq, District Judge of Azamgarh, dated the 21st September, 1883.

(1) Weekly Notes, 1882, p. 111.

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THIS was a reference to the Full Bench by Brodhurst and Duthoit, JJ. It arose out of the following facts. A suit for dissolution of a partnership, the relief sought in the plaint being stated in the terms of the 4th paragraph of Form No. 113, 4th sch., Civil Procedure Code, was instituted in the Court of the Subordinate Judge of Azamgarh. The defendants set up as a defence to the suit, amongst other things, that the suit was not cognizable in the Subordinate Judge's Court, but should, under s 265 of Act IX of 1872 (Contract Act), have been instituted in the District Court, inasmuch as the partnership had been dissolved before the institution of the suit, by mutual consent, and all that remained was to adjust the partnership accounts. The Subordinate Judge allowed this contention, relying on *Prosad Doss Mullick* v. *Russick Lall Mullick* (1) and *Ramayya* v. *Chandra Sekara Rau* (2), and made an order directing that the plaint should be returned to the plaintiffs for presentation to the proper Court. On appeal by the plaintiffs the District Judge affirmed the order of the Subordinate Judge, holding that, as a dissolution of the partnership had taken place, "the claim should be brought in the form of an application under s. 265 of the Contract Act, and could be entertained by a District Judge alone."

The plaintiffs applied to the High Court for revision under s. 622 of the Civil Procedure Code, on the ground that the Subordinate Judge was competent to entertain the suit, and had improperly refused to do so. The case came before Brodhurst and Duthoit, JJ. The learned Judges, after consideration of the following authorities—*Ramayya* v. *Chandra Sekara Rau* (2); *Prosad Doss Mullick* v. *Russick Lall Mullick* (1); *Ram Chunder Shaha* v. *Manik Chunder Banikya* (3); *Harrison* v. *The Delhi and London Bank* (4); *Kalian Das* v. *Ganga Sahai* (5); *Luchman Lall* v *Ram Lall* (6)—referred the following question to the Full Bench:—"Is the jurisdiction provided by s 265 of the Indian Contract Act, 1872, concurrent with, or does it oust, the jurisdiction of the ordinary Civil Courts, as described in Act VI of 1871 and in the Code of Civil Procedure?"

(1) I. L. R, 7 Calc., 157.
(2) I. L. R, 5 Mad, 256.
(3) I. L. R, 7 Calc., 428.
(4) I. L. R, 4 All., 437.
(5) I. L. R., 5 All, 500.
(6) I. L. R., 6 Calc., 521.

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Mr. *T. Conlan* (with him Babu *Jogindro Nath Chaudhri*)—S. 265 of the Contract Act is an enabling section only. Moreover, it refers to the case of partners between whom there is no sort of contention, and who only desire the aid of the Court in bringing the partnership business to a conclusion. The suit is one for dissolution of partnership; such a suit is cognizable in the ordinary Civil Courts. This is shown by the terms of s 215 of the Civil Procedure Code, and of Form No. 113 in the 4th sch. to the Code.

Mr. *G. T. Spankie* (with him Mr. *C. H. Hill*, Mr *W. M. Colvin*, and Babu *Ratan Chand*).—The partnership has been dissolved. The only relief which the plaintiffs can be granted is the winding-up of the partnership business. Their claim must be treated as one for winding-up. The winding-up of a partnership is a matter exclusively cognizable by the District Court. In support of this contention I rely on *Prosad Doss Mullick* v. *Russick Lal Mullick* (1) and *Ramayya* v. *Chandra Sekara Rau* (2).

[The Court, having regard to the terms of the plaint, amended the question referred in the manner following:—" Whether the ordinary Civil Courts have jurisdiction to hear and determine this cause, or whether such jurisdiction is ousted by s. 265 of the Indian Contract Act?"]

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—This suit is for dissolution of a partnership. This is in effect asking the Court to give effect to the partnership agreement. This is a relief which can be sought in the ordinary Civil Courts. S. 265 of the Contract Act is intended to meet a different state of things. The winding-up of a partnership is the taking by the Court into its own hands the settlement of the partnership concerns. It is a jurisdiction which is created by statute. If this was an application under s 265 of the Contract Act, I am inclined to think that the District Court only could entertain it.

OLDFIELD and BRODHURST, JJ., were of opinion that the suit, being one for dissolution of partnership, was cognizable in the ordinary Civil Courts.

MAHMOOD, J.—Judging by the allegations in the plaint and the nature of the reliefs prayed for, I am of opinion that this suit

(1) I. L. R., 7 Calc., 157. (2) I. L. R., 5 Mad., 256.

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is cognizable in the ordinary Civil Courts. It is a suit of a civil nature, within the meaning of s. 11 of the Civil Procedure Code, which provides the general jurisdiction of the Civil Courts subject to the provisions therein contained. There is no provision in the Code to bar the cognizance of such a suit; but, on the contrary, s. 215 contemplates such a suit. Nor am I aware of any enactment which bars the cognizance of such suits by the ordinary Civil Courts. Considering the terms of s. 215 with s. 213, and as well the language of No. 113, sch. iv, taken with s. 644 of the Code, it may be that in such a suit as this the Court will be called upon to take cognizance of matters which might have formed the subject of an application under s. 265 of the Contract Act. But we need not go beyond the general character of the suit to see if it is cognizable by the ordinary Courts; but I wish to guard myself against being understood to lay down the rule that, even if the suit was one involving matters of the character mentioned in s. 265 of the Contract Act, the ordinary Civil Courts would be precluded from entertaining it.

DUTHOIT, J.—I am of opinion that a suit for dissolution of partnership is cognizable in the ordinary Civil Courts.

1884 December 13.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

NIDHI LAL (DEFENDANT) *v.* MAZHAR HUSAIN AND ANOTHER (PLAINTIFFS).*

Jurisdiction—Competency of Subordinate Judge to try Munsif's case—Act XVI of 1868, *ss.* 13, 15, 16—*Act VI of* 1871 *(Bengal Civil Courts Act), ss.* 19, 20—*Civil Procedure Code, ss.* 15, 25, 57 (*a*), 578.

Per PETHERAM, C.J., and BRODHURST, MAHMOOD, and DUTHOIT, JJ. The object of ss. 19 and 20 of the Bengal Civil Courts Act, 1871, was to create in the District Judge, Subordinate Judge, and Munsif concurrent jurisdiction up to Rs. 1,000.

Per PETHERAM, C.J.—S. 15 of the Civil Procedure Code is a proviso to those sections The word "shall" in that section is imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. Whenever an Act confers a benefit, the donee may

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* Second Appeal No. 1176 of 1883, from a decree of F. E. Elliot, Esq., District Judge of Mainpuri, dated the 17th May, 1883, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th January, 1883.

exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it.

Per DUTHOIT, J.—The words in s 57 of the Civil Procedure Code "shall be" are an instruction which the Court is bound to follow; and they are therefore a restraint upon jurisdiction. The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal.

BRODHURST, and MAHMOOD, JJ.—S. 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of higher grades.

Russick Chunder Mohunt v *Ram Lal Shaha* (1) and *Safee-ool-lah Sircar* v. *Begum Bibi* (2) followed.

Per OLDFIELD, J.—S. 15 of the Civil Procedure Code is a provision entirely of procedure as distinct from jurisdiction, and its effect on s. 19 of the Bengal Civil Courts Act is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise to a certain procedure, namely, that the suits be instituted in the Court of lowest grade competent to try them.

Held, therefore, by PETHERAM, C. J., and OLDFIELD, BRODHURST, and MAHMOOD, JJ., where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction.

The plaint in such suit had been in the first instance presented to the Munsif, who had returned it, to be presented to the Subordinate Judge.

Per DUTHOIT, J.—The decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for the jurisdiction was there, though it ought not to have been exercised. This view of the matter was consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction.

Per MAHMOOD, J —The institution of a suit in a Court of higher grade than the Court which is competent to try it, is not a question either as to the jurisdiction or affecting the merits of the case. It is a question of the kind provided for by s. 578 of the Civil Procedure Code, and the irregularity is not one which affects "the merits of the case or the jurisdiction of the Court," within the meaning of that section.

(1) 22 W. R., 301. (2) 25 W. R., 219.

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The plea of want of jurisdiction can be entertained for the first time at any stage of a suit, provided there is on the record sufficient material to substantiate it.

THIS was a reference to the Full Bench by Straight, Offg. C. J., and Duthoit, J. The facts of the case and the point of law referred are stated in the order of reference, which was dated the 12th May, 1884, and was in the following terms :—

"This is an appeal from a decree of the District Judge of Mainpuri, affirming a decree made by the Subordinate Judge of Mainpuri in favour of the plaintiffs (respondents), for possession by redemption of mortgage of a certain "pucka shop," upon payment into Court of Rs. 275, being Rs. 75 on account of the mortgage-debt and Rs. 200 on account of expenses incurred by the mortgagee in re-constructing the mortgaged property.

"In the opening portion of his judgment, the District Judge has made the following remarks :—

"'A preliminary objection is taken by the appellant, *viz.*, that as the suit was cognizable by the Munsif, but was heard by the Subordinate Judge, the Subordinate Judge's proceedings were without jurisdiction, and must be set aside.

"'It appears that the suit was orginally filed in the Court of the Munsif, who returned the plaint to be filed before the Subordinate Judge, on the ground that the market-value of the property (which exceeds Rs. 1,000) was the value of the subject-matter of the suit. The plaint was admitted by the Subordinate Judge, and the case tried and decided by that officer.

"'The Munsif's order was wrong : see *Kubere Singh* v. *Atma Ram* (Weekly Notes, 1883, p. 47) : the amount of the mortgage-money only (Rs. 75) was in question. But this is no reason for setting aside the Subordinate Judge's order on a purely technical point, when this Court has before it all the materials necessary for deciding the case. Even if the circumstances were reversed, and the suit cognizable by the Subordinate Judge had been heard by the Munsif, this Court would not have set aside the decision unless it appeared that the appellant had been prejudiced by the mistake. But if a Subordinate Judge is competent to try cases in which the value of the subject-matter exceeds Rs. 1,000,

he is practically competent to try a case in which it is less than Rs. 1,000; and though the case was not within his jurisdiction, yet as it has been tried, the irregularity is not such as to vitiate his proceedings.'

"In appeal to this Court it is contended that the order of the Munsif returning the plaint and referring the plaintiffs to the Court of the Subordinate Judge could not confer upon that Court a jurisdiction not vested in it by law; that the reasons assigned by the Judge for overruling the plea of jurisdiction are erroneous; and that the decision of the lower appellate Court is contrary to law, inasmuch as, when it found that the suit had been heard and determined by a Court which had no jurisdiction regarding it, it should have decreed the appeal and dismissed the plaintiffs' suit.

"We have considered the following law and authorities:—Act XVI of 1868, ss. 13 and 15; Act VI of 1871, s. 19; Act XIV of 1882, ss. 15, 57, 578 and 584; *Mackintosh* v. *Kashee Nath Biswas* (1), *Russick Chander Mohunt* v. *Ram Lal Shaha* (2), *Sufeeoollah Sircar* v. *Begum Bibi* (3), *Rajendro Lal Gossami* v. *Shama Churn Lahori* (4), *Kushi Ram* v. *Daljit Khan* (5);

"and as it appears to us that the question is one which should be settled by a Full Bench, we refer the following question:—

"If, by *bonâ fide* mistake of the parties, or under mistaken action of the Courts, a suit cognizable by a Munsif has been heard and determined by a Subordinate Judge, and the District Judge in appeal has refused to entertain the plea of defect in jurisdiction, is such refusal erroneous; and, if it be, can it be made ground of second appeal to this Court?"

Pandit *Ajudhia Nath* and Babu *Baroda Prasad*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the respondents.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—The question raised by this reference is whether a District Judge or Subordinate Judge has any jurisdic-

(1) 21 W. R., 450.
(2) 22 W. R., 301.
(3) 25 W. R., 219.
(4) I. L. R., 5 Calc., 188.
(5) Weekly Notes, 1882, p. 45.

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tion to try a suit in which the value of the subject-matter in dispute is less than Rs. 1,000. The question arises on the construction of ss. 19 and 20 of the Bengal Civil Courts Act, and s. 6 of the Civil Procedure Code, 1859, for which ss. 15 and 25 of the present Civil Procedure Code have been substituted. The sections must all be read together. Reading them together, it appears that the jurisdiction of the District Judge or Subordinate Judge extends to all suits cognizable by the Civil Court, whatever the value of the subject-matter in dispute may be. The jurisdiction of the Munsif extends to all like suits the value of the subject-matter in dispute in which does not exceed Rs. 1,000. That is to say, up to Rs. 1,000 the Munsif and the District Judge or Subordinate Judge have concurrent jurisdiction. Then comes s. 6, which must be read in as a proviso. The section which has been substituted is practically the same. The word "shall" is, in my opinion, imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is, that the Court of the higher grade shall not be overcrowded with suits. Whenever an Act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it. Consequently, I am of opinion that the Subordinate Judge had jurisdiction in the present case.

OLDFIELD, J.—By s. 19, Act VI of 1871, the jurisdiction of the District Judge and Subordinate Judge extends, subject to the provisions of s. 6, Act VIII of 1859, to all original suits cognizable by the Civil Court. S. 6 provided that every suit shall be instituted in the Court of the lowest grade competent to try it, and this provision is re-enacted in s. 15 of the present Code of Civil Procedure. This last provision is one entirely of procedure as distinct from jurisdiction, and the effect is that the jurisdiction of the District Judge and the Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise

to a certain procedure, namely, that the suits be instituted in the Court of lowest grade competent to try them.

S. 15 does not in any sense affect jurisdiction, and in the case before us the Subordinate Judge had jurisdiction, although there may have been a transgression of the rule of procedure laid down in s. 15.

I may add that in the case of *Gulzari Lal* v. *Jadaun Rai* (1) the decision turned on a question of valuation, and the point now before us was not, it would seem, raised or discussed.

BRODHURST, J.—For the purpose of disposing of this reference, it is desirable, at the outset, to look at Act XVI of 1868, which was repealed by Act VI of 1871, the Bengal Civil Courts Act now in force.

By referring to ss. 13, 15, and 16 of the former Act, it will be seen that, whilst Munsifs were empowered to try all original suits cognizable by the Civil Court of which the subject-matter did not exceed in value or amount Rs. 1,000, Subordinate Judges were empowered to try all suits cognizable by the said Courts, of which the subject-matter exceeded in amount or value Rs. 1,000, and they were debarred from trying suits of less value unless they had been invested by the Local Government with the powers of a Munsif under s. 13, or such suits had been transferred to them by the District Judge under the Code of Civil Procedure.

The jurisdiction of a Munsif under s. 20, Act VI of 1871, is exactly the same as it was by s. 13, Act XVI of 1868, but the jurisdiction of a Subordinate Judge has been enlarged by the Act in force, for s. 19 declares that his jurisdiction "extends, subject to the provisions in the Code of Civil Procedure, s. 6, to all original suits cognizable by the Civil Court."

Act VIII of 1859 was the Code of Civil Procedure at the time that Act VI of of 1871 came into force, and ss. 15 and 25 of Act XIV of 1882, the Civil Procedure Code now in force, correspond with s. 6, Act VIII of 1859.

The provision of the latter section was, as held by Ainslie and McDonell, JJ., in their judgment in *Russick Chunder Mohunt* v.

(1) I. L. R., 2 All., 799.

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Ram Lal Shaha (1) to be, "a provision intended to regulate the practice of the Courts," and "not intended to take away jurisdiction from any Court which has general jurisdiction"; and Garth, C. J., and Birch, J., in their judgment in *Sufee-ool-lah Sircar* v. *Begum Bibi* (2) observed :—"The Subordinate Judge is empowered by s. 19 of Act VI of 1871 to try causes of any value, although he might very properly, if he had found the subject-matter of the suit to be under Rs. 1,000, have sent it to the Munsif's Court to be tried there ; he had clearly jurisdiction to try it himself, and the fact that he did so try it is no ground of error in special appeal."

Concurring in those rulings, I consider that ss. 15 and 25, as also cl. (*a*), s. 57 of Act XIV of 1882, refer to procedure only, and regulate the practice of the Courts, but do not deprive them of jurisdiction which they may otherwise possess.

The suit which has occasioned this reference was originally instituted in the Munsif's Court, but the Munsif, being of opinion that it was beyond his jurisdiction, returned the plaint to be filed in the Court of the Subordinate Judge ; it accordingly was filed in that Court; no objection was then taken; the Subordinate Judge had jurisdiction to try the suit, and he did try it. The appeal came before the same Judge that would have tried it had the original suit been decided by the Munsif, and neither party appears to have been prejudiced by the case having, under a misapprehension, been decided by the Subordinate Judge, who had more experience, and was holding a higher position in the judicial service than the Munsif, and the District Judge was, I think, right in declining to set aside the Subordinate Judge's proceedings on the ground of their being without jurisdiction.

MAHMOOD, J.—I am of the same opinion, but I wish to explain briefly the manner in which my own mind has arrived at this conclusion. My brother Brodhurst has explained the circumstances of the suit. It was originally instituted in the Court of the Munsif, who returned the plaint under s. 57, cl. (*a*) of the Civil Procedure Code, because he held that the value of the subject-matter of the suit was more than Rs. 1,000, and, therefore, beyond his jurisdiction. No appeal was preferred from the Munsif's order,

(1) 22 W. R., 301. (2) 25 W. R., 219.

although it was appealable under s. 588 of the Civil Procedure Code, and the plaint was taken back by the plaintiff and filed in the Court of the Subordinate Judge. That officer accepted it, tried the case, and passed a decree. The decree was appealed to the District Judge, in whose Court the question was raised, practically for the first time, whether the Subordinate Judge had jurisdiction to try the suit, and this plea rested on the contention that the value of the subject-matter was less than Rs. 1,000. Such being the facts, the question referred to us is as follows:—"If by *bonâ fide* mistake of the parties, or under mistaken action of the Courts, a suit cognizable by a Munsif has been heard and determined by a Subordinate Judge, and the District Judge in appeal has refused to entertain the plea of defect in jurisdiction, is such refusal erroneous; and, if it be, can it be made ground of second appeal in this Court?" I understand this question to raise two distinct points. The first, which I regard as most important, relates to the jurisdiction of the Subordinate Judge. In dealing with this point, it is necessary to refer to Act XVI of 1868, and in particular to ss. 13, 15, and 16. S. 13 says:—"Munsifs are empowered to try all original suits cognizable by the Civil Courts, of which the subject-matter does not exceed in amount or value Rs. 1,000." S. 15 says:—"Subordinate Judges are empowered to try all original suits cognizable by the Civil Courts, of which the subject-matter exceeds in amount or value Rs. 1,000, and (if the District Judge shall have referred them under the Code of Civil Procedure) suits of which the subject-matter is of any less amount or value." These two sections leave no doubt that at the time when Act XVI of 1868 was passed, the Legislature intended that the jurisdiction of the Subordinate Judge should begin where that of the Munsif ceased: in other words, that the Munsif should have jurisdiction to try cases in which the value of the subject-matter did not exceed Rs. 1,000, and that where the subject-matter exceeded that amount in value, the case should be tried by the Subordinate Judge. This conclusion is supported by the terms of s. 16, which says:—"The Local Government may invest any Subordinate Judge with the powers of a Munsif under s. 13, and may define and from time to time vary the local limits within which such powers are to be exercised." I understand from this that

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unless the Subordinate Judge was invested by the Local Government, under s. 16, with the powers of a Munsif, he would have no jurisdiction in any case in which the subject-matter did not exceed in amount or value Rs. 1,000. Such was the law in 1868, and I have now to consider how it was affected by Act VI of 1871. The important sections in that Act, for the purposes of this reference, are ss. 19 and 20. S. 19 says:—"The jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions in the Code of Civil Procedure, s. 6, to *all* original suits cognizable by the Civil Court." S. 20 says:—"The jurisdiction of a Munsif extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000." Now it seems to me that in s. 19 the most important word is "*all*" in the phrase "all original suits;" and reading that section with s. 20, it is perfectly clear that the object of the two sections was to create a jurisdiction in a Subordinate Judge concurrent with a Munsif in suits up to Rs. 1,000 in value, but not concurrent in suits of value beyond Rs. 1,000. This was a distinct alteration of the law, and it is important to notice that the rule contained in s. 16 of Act XVI of 1868 has not been reproduced in Act VI of 1871. An important part of the argument of the learned pleader for the appellant related to the effect of the words in s. 19 of the present Act—"*subject to the provisions in the Code of Civil Procedure, s. 6.*" The Code there referred to is the Code of 1859, and we need not consider s. 6 of that Code, because it has been reproduced, almost *verbatim*, in the present Code, in ss. 15 and 25. By cl. (2), s. 3 of the present Code it is provided that when in any Act passed prior to the day on which the Code came into force, reference is made to the "Code of Civil Procedure," such reference shall be read, as far as may be practicable, as applying to the present Code, or the corresponding part thereof. The question then is:—Reading s. 19 of the Bengal Civil Courts Act with ss. 15 and 25 of the present Civil Procedure Code, is there any reason to hold that in suits of less value than Rs. 1,000 the jurisdiction of the Subordinate Judge is ousted, notwithstanding the general terms of s. 19 of the Bengal Civil Courts Act? In other words, does the reference made by s. 19 to s. 6 of Act VIII of 1859, and therefore to ss. 15 and 25 of the present Code, make

the rule contained in ss. 15 and 25 a rule of jurisdiction? Now, s. 15 says:—"Every suit shall be instituted in the Court of the lowest grade competent to try it," and the important word here is "*competent.*" S. 25 says:—"The High Court or District Court may . . . . withdraw any suit whether pending in a Court of first instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the case itself, or transfer it for trial to any other such subordinate Court *competent* to try the same in respect of its nature and the amount or value of its subject-matter." In this section again the word "*competent*" occurs. I am of opinion that "*competent*" means "having jurisdiction"—that is, with reference to the pecuniary value and nature of the suits which the Court has power to try. It seems to me impossible to put any other interpretation upon the word, in either of the two sections which I have quoted. The language of s. 15 seems to me to contemplate that the Court "*competent*"—that is having jurisdiction—to try the suit may be of more than one grade, because the whole object of the section is to provide that the suit should be instituted in the Court "*of the lowest grade*"—a phrase which would not have been employed if there were not a higher Court possessing jurisdiction to try the suit; in other words, if the jurisdiction were possessed by only one Court. Now, as to s. 25. The section undoubtedly enables the High Court or the District Court to transfer a case of less value than Rs. 1,000 from the Court of a Munsif to that of a Subordinate Judge who would be "*competent*"—that is, would have jurisdiction—to try the suit. It is not that the act of transferring a suit confers jurisdiction; but the existence of jurisdiction with reference to the *nature* and *value* of the suit is a condition precedent to the exercise of the power of transfer. If any other view were to be taken of the section, it would follow that the High Court or the District Court could transfer a suit of higher value than Rs. 1,000, from the Court of a Subordinate Judge to that of a Munsif. This of course cannot be done, and the reason is that the Munsif's Court is not "*competent*"—that is, has no jurisdiction—to try suits of higher value than Rs. 1,000. From this reasoning it follows that on the one hand s. 15 of the Civil Procedure Code itself contemplates no distur-

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bance of jurisdiction as provided by the Civil Courts Act; and on the other hand, its provisions, both in s. 15 and s. 25, proceed upon the implied ground that, whilst the Munsif's Court has no jurisdiction in suits of higher value than Rs. 1,000, "the jurisdiction of a District Judge extends.....*to all original suits* cognizable by the Civil Courts." These are the words of s. 19 of the Civil Courts Act itself; but the section says that the rule as to jurisdiction therein contained is subject to the provisions of the Civil Procedure Code, and on this ground it is contended by the learned pleader for the appellant that ss. 15 and 25 of the Code must be considered as part and parcel of Act VI of 1871, and therefore form a rule of jurisdiction, and that the effect is to limit the jurisdiction of the Subordinate Judge to suits of which the subject-matter exceeds Rs. 1,000 in value. But, in my opinion, this contention has no force. I have already explained that the two sections of the Civil Procedure Code cannot be understood to disturb the rule as to jurisdiction contained in the Civil Courts Act, so that the circumstance that they are referred to in the latter Act falls far short of substantiating the argument for the appellant. Any other view of the matter would go to show that Act VI of 1871 made absolutely no alteration in the law as it was contained in Act XVI of 1868. This indeed is what the learned Pandit has contended for, but I have already said enough to show that it is impossible, after comparing the two statutes, which are *in pari materia*, to arrive at any such conclusion. My own view is that s. 19 of Act VI of 1871 refers to the Civil Procedure Code merely as a matter of convenience. S. 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction; and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of any Court of a higher grade. In order to fortify his argument the learned Pandit called our attention to s. 57, cl. (*a*) of the Civil Procedure Code, which lays down that the plaint shall be returned to be presented to the proper Court, "if a suit has been instituted in a Court whose grade is lower or higher than that of the Court *competent* to try it, where such Court exists, or where no option as to the selection of a Court is allowed by law." The word "*competent*" occurs in this section also, and I interpret it in the same manner as in

ss. 15 and 25. The provision is no doubt imperative, but it is merely a matter of procedure, and does not affect the question of jurisdiction. It simply repeats in another form the rule contained in s. 15 of the Code. The learned Pandit, however, contends that the language of the clause goes to show that there is only one Court "*competent*"—that is, which has jurisdiction—to try the suit. The contention, though plausible, has no real force, because, in the first place, the section is not referred to in s. 19 of the Civil Courts Act; in the second place, it cannot be read irrespective of s. 15 of the Civil Procedure Code, and bearing this in mind, there can be no doubt that the clause is only a rule of procedure and does not affect the question of jurisdiction.

This conclusion is the same as that of the learned Judges who tried the cases in the Calcutta High Court which have been cited by my learned brother Brodhurst, and I entirely agree with the opinions which those learned Judges expressed. My answer to the reference upon the first point, therefore, is that the Subordinate Judge had jurisdiction to try the case, although the subject-matter of it may be less than Rs. 1,000 in value.

I wish to refer for a moment to another part of the argument of the learned Pandit. He referred to s. 6 of Act XI of 1865 (the Mufassal Small Cause Courts Act), and asked us whether a Subordinate Judge could dispose of a suit which was cognizable in Courts of Small Causes. Now, the section describes the nature of suits which are cognizable by such Courts, and then there is a most important section which goes far to furnish an answer to the question put by the learned Pandit. S. 12, which is imperative, says :—"Whenever a Court of Small Causes is constituted under this Act, no suit cognizable by such Court shall be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes." We are not directly concerned with the effect of this section. I have quoted it in order to show that the analogy upon which the argument of the learned Pandit proceeds has no weight in connection with the matter now before us. The language of the section is different to that of s. 15 of the Civil Procedure Code, and I should be disposed to say that whilst the latter section is meant

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to be imperative upon the parties, the terms of the former section would go to show that the rule therein contained is imperative upon the Courts and affects their jurisdiction. Indeed, reading s. 12 of the Small Cause Courts Act with s. 26 of the Civil Courts Act itself, it seems to me that the ordinary Civil Courts do not possess the jurisdiction of a Court of Small Causes unless they are especially invested with such jurisdiction by the Local Government. S. 11 of the Civil Procedure Code is the general section conferring jurisdiction upon the ordinary Civil Courts, and the jurisdiction so conferred is subject to the last part of the section, and in the case of the Small Cause Courts the limitation upon the general rule is contained in s. 12 of Act XI of 1865. It is true that under s. 25 of the Civil Procedure Code a suit may be transferred from a Court of Small Causes to one of the ordinary Civil Courts, provided that the latter Court is "*competent* to try the same in respect of its *nature* and the *amount or value* of its subject-matter;" but this can be done not because the mere act of transferring would confer jurisdiction, but because the language of the statute in the last paragraph of the section expressly provides that "the Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes." But for this express provision of the law I should have been disposed to hold that because s. 12 of Act XI of 1865 ousts the jurisdiction of the ordinary Civil Courts in certain cases, no such case could be transferred under s. 25 of the Civil Procedure Code from a Small Cause Court to an ordinary Civil Court. These observations satisfy me that there is no real analogy between s. 12 of the Small Cause Courts Act and s. 15 of the Civil Procedure Code, and it does not follow that if the one is a matter of jurisdiction, the other should be a matter of jurisdiction also.

The second point is:—Assuming that the Subordinate Judge had no jurisdiction to try the present suit, could the plea of want of jurisdiction be taken for the first time in first appeal, or in second appeal?

What I have already said upon the first point disposes of the second. The trial by a Subordinate Judge of a suit of which the subject-matter is less than Rs. 1,000 in value, is not an assumption by him of a jurisdiction which he does not possess, but is, at the most,

an irregularity of procedure on his part. I would not willingly say anything which encouraged people to think that they were at liberty to choose whether they would enforce their remedies in the Munsif's or in the Subordinate Judge's Court. But at the same time I must say that the institution of a suit in a Court of higher grade than the Court which is competent to try it, is not a question either as to the jurisdiction or affecting the merits of the case. It is a question of the kind provided for by s. 578 of the Civil Procedure Code, and the irregularity is not one which affects "the merits of the case or the jurisdiction of the Court," within the meaning of that section. It only remains for me to add that if the irregularity did affect the jurisdiction of the Court, the plea could, I think, be entertained for the first time at any stage, provided that there were on the record sufficient material to substantiate it.

DUTHOIT, J.—The questions raised by this reference have been argued in the following order :—

(*a*) Has a Subordinate Judge, or has he not, jurisdiction to hear and determine a "Munsif's case" not referred to him for trial by a superior Court?

(*b*) If (*a*) be answered in the negative, then is a District Judge, or is he not, bound to entertain in first appeal the plea of defect of jurisdiction?

(*c*) Supposing (*b*) to be answered in the affirmative, and (*a*) in the negative, then, if a District Judge refuses to entertain the plea of want of jurisdiction, is his refusal, or is it not, a valid ground of second appeal to this Court?

As regards the first of the questions thus stated, it has been contended on the one hand, that jurisdiction to hear a "Munsif's case" is given to a Subordinate Judge by the terms of s. 19 of the Bengal Civil Courts Act (VI of 1871); that jurisdiction can be ousted only by express provision of law, which in this case does not exist; that in the analogous case of Mufassal Small Cause Court jurisdiction, this principle has been recognized (s. 12, Act XI of 1865); that in the case of the Presidency Small Cause Courts not only has the principle been recognized as regards suits, the value of the subject-matter of which does not exceed Rs. 1,000, but in Small Cause Court suits of greater value the High Courts

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have concurrent jurisdiction (*cf.* s. 12 of the Letters Patent, Calcutta High Court, and Act XV of 1882); and that the intention of the Legislature appears to have been to allow to District and Subordinate Judges a concurrent jurisdiction with Munsifs in "Munsif's cases," and to District and Subordinate Judges a concurrent jurisdiction in Subordinate Judge's cases, but at the same time to protect defendants from being needlessly harassed, by providing District and Subordinate Judges (by s. 15 of the Civil Procedure Code) with the means of exercising a discretion as to what suits, cognizable by an inferior Court, they should, and what they should not, accept for trial in their own Courts.

On the other hand, it is contended that the jurisdiction conferred by s. 19 of Act VI of 1871 is not conferred absolutely, but is made subject to the restrictions imposed on it by the Code of Civil Procedure; that the terms of s. 57 (*a*) of Act XIV of 1882 constitute an express provision of the law, ousting (except under the provision of s. 25) the jurisdiction of Subordinate Judges in "Munsif's cases," wherever a Munsif's jurisdiction exists; that the case of the Presidency Small Cause Courts is not truly analogous, because (s. 638, Act XIV of 1882) s. 57 of the Code of Civil Procedure does not apply to High Courts; and that the intention of the Legislature was, while preventing Subordinate Judges from throwing open their Courts to suitors who might prefer to use them to using those of Munsifs, to allow at the same time to the superior Courts, for reasons which they might think satisfactory, power to refer for trial any cause to a Court of higher grade than that primarily competent to try it.

Neither of these arguments appears to me to be correct as a whole. The truth appears to me to lie between them. Taking it together (*cf.* s. 3, Act XIV of 1882), I read the law thus:—

The jurisdiction of a District or Subordinate Judge extends to all original suits cognizable by the Civil Court. The jurisdiction of a Munsif extends to all like suits in which the amount or value of the subject-matter does not exceed Rs. 1,000 (ss. 19 and 20, Act VI of 1871). Every suit shall be instituted in the Court of lowest grade competent to try it (s. 15, Act XIV of 1882). If a suit has been instituted in a Court whose grade is higher than that of the Court competent to try it, the plaint shall, where such Court exists,

be returned to be presented to the proper Court (s. 57, Act XIV of 1882). The High Court or District Court may withdraw any suit, and try the suit itself, or transfer it for trial to any subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter (s. 25, Act XIV of 1882).

High Courts, in the exercise of their original jurisdiction, are not subject to the provisions of s. 57 of the Code of Civil Procedure, but District and Subordinate Judges are bound by them ; and I fail, with reference to those provisions of the law, to understand how a Subordinate Judge, in whose Court a suit cognizable by a Munsif (where a Munsif's Court exists) has been filed, can have any option as to returning the plaint, as soon as the fact that the suit is a "Munsif's case" has been ascertained. There is a marked distinction between the terms of s. 53 of the Code of Civil Procedure and those of s. 57. The words "at or before the first hearing" are absent from s. 57, and instead of "*may* be" rejected, &c., we have in s. 57, as in s. 54, the words "*shall* be." I can only understand those words as an instruction which the Court is bound to follow. And if this be so, they are a restraint upon jurisdiction, and it is no more open to a Subordinate Judge to proceed with the hearing of a suit which he has ascertained to be a "Munsif's case" (there being a Munsif with jurisdiction to try it), than he would be if the plaint were written upon paper insufficiently stamped, and the plaintiff, within a time fixed by the Court, failed to supply the deficiency ; or if it was ascertained that the cause of action did not arise, &c., within the limits of his local jurisdiction. In the case of the insufficiently stamped plaint, the Subordinate Judge would be bound to reject it ; in the other two cases, he would, as it seems to me, be bound to return it. I am unable therefore to agree with the view taken by the learned Chief Justice, that the effect of the concurrent jurisdiction of Subordinate Judges and Munsifs is to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal. And I find it impossible to believe that it can have been the intention of the Legislature to allow such a discretion. The institution fee and the pleader's fees are the same, whether the suit be heard and determined in a

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Munsif's or in a Subordinate Judge's Court, and the difference between the process fees payable in the one Court and in the other is so trivial that a plaintiff would not be deterred, by a refusal of the Court to allow as costs on this account more than the fees payable in the Court of lower grade, from bringing his suit in the superior Court. No one who is conversant with the administration of civil justice in the interior of this part of India would find it difficult to imagine the case of a Subordinate Judge readily admitting into his own Court, if he were allowed to do so, *munsifi* litigation. It is obvious that such an event would materially detract from the usefulness of the Munsif, and it seems to me that it was to prevent the possibility of such a state of things that s. 57 (*a*) of Act XIV of 1882 was enacted.

When, however, I reach the point of the effect of the neglect by a Subordinate Judge to return the plaint in a "Munsif's case," I am practically of the same opinion as the learned Chief Justice.

A Subordinate Judge who failed to reject or to return the plaint in the cases set out above would, I consider, be guilty of misconduct, and, on failure to furnish satisfactory explanation, would be liable to censure and to departmental punishment. But then the analogy between the three analogous cases which I have noticed above would, I think, cease, and each of the three cases would be governed by distinct provisions of the law. The suit for the institution of which the proper fees had not been paid would have to be dismissed in the terms of s. 10, and, if decreed, would probably have to be disposed of in appeal in the terms of s. 12 of the Court Fees Act, 1870. The suit in which the cause of action did not arise within the local limits of the jurisdiction of the Subordinate Judge would have to be dismissed, and, if decreed, would have to be dismissed in appeal, with reference to the terms of s. 578 of the Code of Civil Procedure and to those of s. 18 of Act VI of 1871. But the decree in a suit cognizable by a Munsif would not, in my judgment, be liable to be reversed in appeal for want of jurisdiction in the Subordinate Judge: for the jurisdiction was there, though it ought not to have been exercised. And this view of the matter is, I think, consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure

as essential, the rule will ordinarily be treated as a direction only. "Where," writes Sir P. B. Maxwell (*Maxwell on the Interpretation of Statutes*, 2nd Edition, p. 459), "the prescriptions of a statute relate to the performance of a public duty, and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature, they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal in deed, but it does not affect the validity of the act done in disregard of them." In this instance the plaint was originally filed in the Court of the Munsif, but it was returned by the Munsif to be presented in the Court of the Subordinate Judge. To send the plaintiff back at this stage of the proceedings to the Munsif's Court would surely be most inequitable.

My answer then to the question put to the Full Bench must be that the refusal of the District Judge to entertain the plea of defect in jurisdiction, in the circumstances stated, is not, in my opinion, erroneous, but correct.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

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December 13.

SHEORAJ RAI (PLAINTIFF) *v.* KASHI NATH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, ss. 13, 45—Res judicata—Matter directly and substantially in issue—Meaning of "suit" in s. 13.

S sued *K* for four bonds, alleging that the same had been satisfied. *K* had formerly sued *S* on two of these bonds. *S* had alleged in defence of that suit that those two bonds, as also the other two, had been satisfied. It was decided in that suit that not one of the bonds had been satisfied.

Held by PETHERAM, C. J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ., that the only issue in the former suit which had to be decided being whether the bonds on which that suit was brought had been satisfied or not, the second suit was, under s. 13 of the Civil Procedure Code, *res judicata* only in respect of those bonds, and not in respect of the other two bonds.

The Court which tried the former suit had not jurisdiction to try the subsequent suit.

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* Second Appeal No. 167 of 1884, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 15th December, 1883, affirming a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 21st March, 1883.

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Per MAHMOOD, J.—This being so, if the word "suit" in s. 13 were taken literally, it might, with some plausibility, be contended, that there was no *res judicata* in respect of any of the bonds. The word "suit," however, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 45, which enables the plaintiff to unite several causes of action in one and the same suit.

Adopting this interpretation, it was clear that the two bonds which were the subject of the former suit could not be allowed to form the subject of litigation again.

As to the other two bonds, which were not the subject-matter of the former suit, they did not, in the former suit, constitute a "matter directly and substantially in issue," within the meaning of s. 13; and even if they were "directly and substantially in issue," the decision in the former suit would not support the plea of *res judicata*, because the Court which tried that suit was not a Court of jurisdiction competent to try the subsequent suit in which the plea was raised.

THE plaintiff in this case sued the defendants for the delivery of four bonds, two dated the 7th Pus Badi 1285 fasli, and the other two dated, respectively, the 12th Pus Badi and the 3rd Chait Badi 1285 fasli. He claimed on the ground that the bonds had been paid. It appeared that the defendants had formerly sued the plaintiff on the two bonds dated the 7th Pus Badi 1285 fasli The plaintiff had set up as a defence to that suit that he had paid those bonds as well as the other two bonds, dated, respectively, the 12th Pus Badi and the 3rd Chait Badi 1285 fasli. The Court by which that suit was heard (Munsif) fixed as a point for decision "whether the bonds in suit and other bonds have been satisfied or not." On this point it decided that the plaintiff had not paid the defendants anything in respect of the bonds, and it gave the defendants a decree. This decree was affirmed by the Subórdinate Judge on appeal.

The defendants set up as a defence to the present suit, *inter alia*, that the question whether the bonds had been paid was *res judicata*. Both the lower Courts allowed this defence.

In second appeal the plaintiff contended in his memorandum of appeal that, inasmuch as the value of the subject-matter of the present suit exceeded the pecuniary limits of the jurisdiction of the Court which decided the former suit, nothing which that Court decided could operate in the present suit as *res judicata*. The Divisional Bench (MAHMOOD and DUTHOIT, JJ.) hearing the appeal

referred the case to the Full Bench, the order of reference being as follows :—

"The suit from which this appeal has arisen was instituted in the Court of the Subordinate Judge, with the object of recovering four bonds executed at different times by the plaintiff in favour of the defendants. The suit was valued at Rs. 2,025, and the allegation upon which the suit was based was, that the plaintiff had already liquidated the debts to which the bonds related.

"It appears that on a former occasion the defendants had sued the plaintiff on two of the bonds now in question, and had obtained a decree on the 11th March, 1882, from the Court of the Munsif, who, with reference to the valuation of that suit, had jurisdiction to decide that case. In that case the plaintiff had set forth in defence the same allegations as those on which he has now come into Court, and the issue raised in that case was identical with the one raised in this suit. The issue was in that case decided against the plaintiff by the Munsif, and the judgment was upheld in appeal by the Subordinate Judge on the 27th July, 1882.

"The Subordinate Judge, whilst holding that the present suit was barred by reason of the judgments in the former litigation, entered into the merits of the case, and dismissed the suit. On appeal, the learned District Judge upheld the decree, and declined to enter into the merits, holding that the suit was barred by s. 13 of the Civil Procedure Code, and for this view he has relied upon the ruling of this Court in *Pahlwan Singh* v. *Risal Singh* (1) and the ruling of the Calcutta High Court in *Run Bahadoor Singh* v. *Lucho Kooer* (2).

"The plaintiff has preferred this second appeal, and Mr. *Conlan*, who has appeared on his behalf, contends that the former suit having been disposed of by the Munsif, the finding in that case could not operate as *res judicata*, so as to bar the present suit, the valuation of which exceeds the jurisdiction of the Munsif. In support of his contention, the learned counsel cites the recent Privy Council ruling in the case of *Misir Raghobardial* v. *Sheo Baksh Singh* (3).

"The point raised in this case is, no doubt, of considerable importance and involves much difficulty. The ruling of this Court

(1) I. L. R., 4 All., 55. (2) I. L. R., 6 Calc., 406.
(3) I. L. R., 9 Calc., 439; L. R., 9 Ind. Ap., 197.

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in the case of *Pahlwan Singh* does not appear to have much application to this case, because the Court which had decided the former suit was competent to try the subsequent suit wherein the plea of *res judicata* was raised. In the present case the Court which decided the former suit was the Court of the Munsif, who, by reason of the pecuniary limits of his jurisdiction, would not have been competent to entertain the present suit. The ruling of the Calcutta High Court, cited by the learned District Judge, is, however, applicable, and supports the view of the law taken by him. But the rule laid down in that case militates against the ruling of the Privy Council cited by Mr. *Conlan*. In that case their Lordships, in interpreting s. 13 of the Civil Procedure Code (Act X of 1877), held that the words "Court of competent jurisdiction" included the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the subsequent suit wherein *res judicata* was pleaded as a bar, and that before the plea could hold good the two Courts must possess jurisdiction concurrent as regards the pecuniary limit as well as the subject-matter.

"In considering the question it is important to notice that the body of s. 13 of the Civil Procedure Code of 1877 has re-appeared in a modified form in the present Code, and the change of diction is very considerable. As the section stands, it would seem that no adjudication can form the basis of the plea of *res judicata*, unless the Court which decided the former suit would be competent to decide the suit in which the plea is raised. In the present case, out of the four bonds to which the suit relates, two have already been the subject of adjudication by the Court of the Munsif; but that Court would not be competent to try the present suit. The question then is, whether the present suit, at least so far as it relates to the two bonds, is not subject to the rule of *res judicata*? The language of s. 13 of the present Code is so general that it seems doubtful whether it is not applicable to the present case. We feel, however, some difficulty in adopting such a view. The present suit, as a whole, is undoubtedly beyond the pecuniary limits of the Munsif's Court, but it is so because the plaintiff, availing himself of the provisions of s. 45 of the Civil Procedure Code, has joined several causes of action, and has thus included

in the suit the two bonds already adjudicated upon in the former suit in the Munsif's Court.

"In view of these considerations we refer the following questions to the Full Bench :—

"Is the present suit wholly or partially governed by the rule of *res judicata*, by reason of the former adjudication between the parties ?"

Mr. *T. Conlan* and Munshi *Sukh Ram*, for the appellant.

Mr. *C. Dillon* and Munshi *Kashi Prasad*, for the respondents.

Mr. *T. Conlan.*—The decision of the Munsif in respect of the bonds on which the suit in his Court was brought cannot affect the bonds in respect of which there was no claim in his Court. [MAHMOOD, J.—Do you not contend that, even in respect of the bonds that were sued on in the Munsif's Court, there is no *res judicata*, inasmuch as the Munsif could not have tried the present suit in respect of all the bonds?] No; I do not. I confine my argument to the bonds which were not sued on in the Munsif's Court.

Munshi *Kashi Prasad.*—There was an appeal from the Munsif's decree; the Subordinate Judge affirmed his decision. Even if the Munsif was not competent to try the present suit, the appellate Court was. Therefore there exists everything which goes under s. 13 of the Civil Procedure Code to make a matter *res judicata.* [DUTHOIT, J. —The matter as to the bonds not in suit was not "directly" in issue.] The issue framed by the Munsif shows that that matter was "directly" in issue.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—We are all agreed that the District Judge is wrong in holding that there is *res judicata* as regards the whole of the suit. The difficulty has arisen from a misconception as to what was in issue in the former suit and what was alleged in evidence in that suit. The only issue in that issue was, whether the two bonds sued on had been satisfied. To prove this the defendant adduced evidence showing that all the bonds had been satisfied. The Munsif found that the defendant had not paid anything. But the only question which the Munsif had to decide was, whether the

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two bonds sued on in his Court had been paid. The answer to the reference should therefore be that the suit, as regards those bonds, is *res judicata*, but not as regards the other bonds.

OLDFIELD and BRODHURST, JJ., concurred.

MAHMOOD, J.—The point raised by the argument of the learned counsel for the appellant is simple, and I am anxious to explain that I should not have been a party to the reference had I not thought that his contention before the Divisional Bench was that the plea of *res judicata* was not applicable in respect of any of the bonds. The question now seems to be confined to the bonds which were not the subject of the former suit, and in determining the question I only wish to add a few words to what the learned Chief Justice has already said. The rule of *res judicata* is regulated in this country by the language of s. 13 of the Civil Procedure Code. The body of that section is thus worded :—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." There can be no doubt that all the bonds are subject of dispute in the present suit, and it is obvious that the Munsif who disposed of the former suit is not "a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised," within the meaning of the section. It seems to me, therefore, that if the word "*suit*" were taken literally, it might with some plausibility be contended that there is no *res judicata* in respect of any of the bonds. In my opinion the word "*suit*," as it occurs in s. 13, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 45, which enables the plaintiff to unite several causes of action in one and the same suit. Adopting this interpretation, it is clear that the two bonds which were the subject of the former suit cannot be allowed to form the subject of litigation again; and the circum-

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stance that the plaintiff has joined them in the present litigation will not enable him to obviate the plea of *res judicata*.

As to the rest of the case, that is the other two bonds which were not the subject-matter of the former suit in the Munsif's Court, the answer is clear. I hold that those bonds did not in that suit constitute a "matter directly and substantially in issue," within the meaning of s. 13 of the Code, although they were discussed as a matter of evidence; and that even if they were "directly and substantially in issue," I should say that the finding of the Munsif would not support the plea of *res judicata*, because the Munsif was not a Court of jurisdiction competent to try the present suit in which the plea has been raised.

I am, therefore, of opinion that the present suit, so far as it relates to the two bonds which formed the subject of adjudication in the former suit, is barred by the rule of *res judicata*, and the rest of it is not so barred.

DUTHOIT, J, concurred in holding that the suit was *res judicata* only in respect of the bonds on which the former suit was brought.

Before Sir W. Comer Petheram, Kt, Chief Justice, Mr. Justice Oldfield, Mr Justice Brodhurst, Mr Justice Mahmood, and Mr. Justice Duthoit.

1884
December 13.

TOTA RAM (DECREE-HOLDER) *v.* KHUB CHAND (PURCHASER).*

Execution of decree—Sale in execution—Order disallowing objections to sale—Order confirming sale—Appeal—Civil Procedure Code, ss. 311, 312, 313, 314, 588 (16)

Per PETEHRAM, C J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ —An order passed under the first clause of s. 312 of the Civil Procedure Code, after an objection made under the provisions of s. 311 has been disallowed, is appealable under art. (16) of s. 588.

Per MAHMOOD, J.—An application made under s. 311 can be disposed of only under s. 312, and if the Court rejects the objection to the sale the order must be regarded as an order "refusing to set aside a sale of immoveable property" under the first paragraph of s 312, and therefore appealable as falling under the purview of art. (16) of s. 588

Lalman v. *Rassu Lal* (1) and *Rajan Kuar* v. *Lalta Prasad* (2) dissented from by MAHMOOD, J.

THIS was a reference to the Full Bench by Mahmood and Duthoit, JJ. It arose out of the following facts. A decree-holder,

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* First Appeal No. 26 of 1884, from an order of Pandit Kashi Narain, Munsif of Etawah, dated the 18th December, 1883.

(1) Weekly Notes, 1882, p. 117. (2) Weekly Notes, 1883, p. 178

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in the execution of whose decree certain immoveable property had been sold, applied, on the 3rd October, 1883, to have the sale set aside. The main ground of this application was that one Khub Chand, having purchased the property in question from the judgment-debtor, had proposed to the decree-holder, on the day the execution-sale took place, to pay the amount of the decree, if he would remit Rs. 50; that the decree-holder consented to this arrangement, and upon this intending purchasers believed that a sale would not take place; that Khub Chand left the decree-holder on the pretence of bringing the money; but instead of doing so, went to the place of sale and purchased the property himself for a very inadequate price. The Court executing the decree (Munsif of Etawah), by an order dated the 18th December, 1883, rejected the application, and, by a subsequent order, dated the following day, 19th December, confirmed the sale.

The decree-holder appealed to the High Court from the order of the Munsif, dated the 18th December, 1883, rejecting his application to set aside the sale, making the judgment-debtor and Khub Chand, the purchaser at the sale, respondents to the appeal. The appeal came for hearing before Mahmood and Duthoit, JJ.

On behalf of the respondent Khub Chand a preliminary objection was taken, that the order of the 18th December, 1883, was not appealable, being the order by which the decree-holder's objections to the sale were disallowed, and not the order confirming the sale. The learned Judges, with reference to this objection, referred the following question to the Full Bench:—"Is or is not an order, passed under the first clause of s. 312 of the Code of Civil Procedure, disallowing an objection made under the provisions of s. 311 of the Code of Civil Procedure, appealable under art. (16) of s. 588 of the Code."

Babu *Baroda Prasad*, for the respondent Khub Chand.—The order disallowing objections to a sale is not made appealable by the Code. [The Court amended the question referred in manner following:—"Is or is not an order, passed under the first clause of s. 312 of the Civil Procedure Code, after an objection made under the provisions of s. 311 of the Code of Civil Procedure has been disallowed, appealable under art (16) of s. 588 of the Code?"]

Lala *Lalta Prasad*, for the appellant.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—My answer to the question referred to us as amended is in the affirmative.

OLDFIELD, BRODHURST, and DUTHOIT, JJ., concurred.

MAHMOOD, J.— I am of the same opinion as the learned Chief Justice; but as one of the Judges who referred the matter to the Full Bench, I wish to explain the reasons which led to the reference. S. 311 of the Civil Procedure Code provides for cases in which either "the decree holder, or any person whose immoveable property has been sold" in execution of decree, may apply to the Court, raising objections to the sale, and praying that it may be set aside. S. 312 confers the power upon the Court either to reject the application, in which case the sale is confirmed, or to allow the objections, and to set aside the sale. Then comes s. 313, which provides for cases in which the purchaser is also entitled to pray for setting aside the sale, and the same section empowers the Court to grant or reject the application. S. 314 says that "no sale of immoveable property in execution of a decree shall become absolute until it has been confirmed by the Court."

Now, reading these sections together, it would seem that the most convenient course for the Court would be to dispose of all objections to the sale in one and the same proceeding, and to confirm the sale by the same order, if all the objections have been rejected. But the usual practice of the Courts in the mufassal is to take up the objections, whether they are raised by the decree-holder, the judgment-debtor, or the auction-purchaser, and to dispose of them separately, and afterwards to pass an order confirming the sale, if the objections have already been disallowed. There are two rulings of this Court—*Lalman* v. *Rassu Lal* (1)—and *Rajan Kuar* v. *Lalta Prasad* (2),—in which it has been held that an order disallowing objections to a sale was not an order under the first paragraph of s. 312, so as to make it appealable under cl. (16) of s. 588, Civil Procedure Code, and that the only order appealable was that which confirmed the sale, within the meaning of s. 312 of the Code. The accuracy of these two rulings was doubted by me

(1) Weekly Notes, 1882, p. 117. (2) Weekly Notes, 1883, p 178.

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in the unreported case of *Baldeo Singh* v. *Azimunnissa Bibi* (First Appeal from Order No. 1 of 1884), which was disposed of on the 10th June last, but the exigencies of that case did not require my passing a dissentient order.

In the present case the question arose because the appeal has been preferred, not from an order confirming the sale under s. 312, but from an order disallowing objections to the sale; so that if the two rulings of this Court to which I have referred were to be adopted, the appeal would not lie under cl. (16) of s. 588 of the Code. This was the reason why the question was referred to the Full Bench.

With due respect to the two rulings of this Court to which I have referred, I am unable to agree in the rule therein laid down. I am of opinion that an application made under s. 311 can be disposed of only under s. 312, and if the Court rejects the objection to the sale, the order must be regarded as an order "refusing to set aside a sale of immoveable property" under the first paragraph of s. 312, and therefore appealable as falling under the purview of cl. (16) of s. 588 of the Civil Procedure Code.

CIVIL REVISIONAL.

1884 December 16.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

GANGA PRASAD (PLAINTIFF) *v.* CHANDRAWATI AND ANOTHER (DEFENDANTS)*.

Assignment of rent of land—Suit by assignee against tenant—Jurisdiction—Civil and Revenue Courts—Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 93 (*d*).

A suit by the person, to whom a landholder has assigned rents payable to him by tenants, for the recovery of the money so assigned, is a suit cognizable in the Civil Courts and not in the Revenue.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of the Civil Procedure Code. It appeared that the proprietors of an eight-anna share in a village called Puchar were indebted to the plaintiff in this suit in the sum of Rs. 500. By an instrument, dated the 8th April, 1881, executed by the debtors, they assigned to the plaintiff Rs. 109, the aggregate yearly amount of rent payable to them by certain tenants

* Application No. 237 of 1884, for revision, under s. 622 of the Civil Procedure Code of an order of G. R. C. Williams, Esq., Deputy Commissioner of Jhánsi, dated the 24th June, 1884.

(the rents payable by the tenants being specified), and agreed that he should satisfy the debt by collecting the rents specified for ten harvests. This instrument was signed by the tenants whose rents were assigned, and they agreed therein to pay their rents to the plaintiff, and, if instead of doing so, they paid them to the zamindars, that they should be liable to pay them a second time. The plaintiff brought the present suit against two of the tenants to recover the amount of rent payable by them respectively in respect of certain harvests. The total amount which he sought to recover was Rs. 33. The suit was instituted in a Civil Court. The Court of first instance gave the plaintiff a decree for Rs. 33. On appeal by the defendants the appellate Court set aside the decree and dismissed the suit, holding that the suit was not cognizable in the Civil Courts, being one to recover rent, and therefore cognizable exclusively in the Revenue Courts. It observed as follows:—"The fact of the tenants having been parties to the instrument by which the debtors assigned their rents to their creditor, on which the plaintiff apparently relies, treating them as common sureties, cannot, in my opinion, affect the nature of the assignment. I therefore rule that the suit ought to have been instituted under cl. (*a*), s. 93 of Act XII of 1881."

The plaintiff applied to the High Court for revision, contending that the appellate Court was wrong in holding that the suit was not cognizable in the Civil Courts.

Babu *Jogindro Nath Chaudhri*, for the plaintiff.

The defendants did not appear.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The suit is cognizable in the Civil Courts, being for a sum of money, namely rents, assigned to the plaintiff. The decree of the appellate Court is set aside, and it is directed to dispose of the appeal on the merits.

Application allowed.

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December 29.

FULL BENCH.

Before Sir W Comer Petheram, Kt, Chief Justice, Mr. Justice Oldfield, Mr Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

SHEORATAN KUAR AND OTHERS (DEFENDANTS) *v.* MAHIPAL KUAR (PLAINTIFF).*

Pre-emption—Simple mortgage—"Transfer"—Wajib-ul-arz—Mortgage—Charge—Act IV of 1882 (*Transfer of Property Act*), *ss.* 58, 100.

The *wajib-ul-arz* of a village gave a right of pre emption to co sharers on a transfer (*intikal*) by sale or mortgage (*rahn*) by a co sharer of "rights and interests" (*hakkiyat*).

Per PETHERAM, C. J, that, as a simple mortgage, as defined in s. 58 of the Transfer of Property Act, 1882, by giving a right to sell, transfers an interest in the property mortgaged, a simple mortgage of his share by a co-sharer created a right of pre-emption under the terms of the *wajib-ul-arz.*

Per MAHMOOD, J —The circumstance that possession had not been transferred to the mortgagee was one which had no bearing on the question whether a right of pre-emption arose under the terms of the *wajib-ul-arz* in the case of a simple mortgage.

The word "*intikal*," as used in Hindustani, has the broadest meaning in connection with "alienation," "conveyance," "assignment," or "transfer" of rights in immoveable property.

The word "*hakkiyat*" means rights and interests, in the legal sense of the phrase. The word "*rahn*" is a generic word indicating all that is included in the English word "mortgage," and is not limited to usufructuary mortgages, but includes simple mortgages also.

When general words are used in a document, they must be understood in a general sense, unless they are accompanied by any expression limiting or restricting their ordinary meaning, or unless such limitation or restriction arises from necessary implication.

The words "*intikal*," "*hakkiyat*," and "*rahn*" in the *wajib-ul-arz* could be understood only in the most general use.

"Mortgage," as understood in Indian Law, includes simple mortgage as well as usufructuary, and one is as much a "transfer of an interest in specific immoveable property" as the other.

A simple mortgage is a "transfer," being the transfer of the right of sale.

Held, therefore, by MAHMOOD, J., that a right of pre-emption accrued under the terms of the *wajib-ul-arz* in the case of a simple mortgage by a co-sharer of his share to a "stranger"

Per BRODHURST, J., that one of the entries in a statement showing the transfers which had taken place in the village at or about the time the *wajib-ul arz* was

* Second Appeal No 1308 of 1883, from a decree of R J Leeds, Esq, District Judge of Gorakhpur, dated the 5th July, 1883, reversing a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 24th July, 1882.

framed, which statement was connected with the *wajib-ul-arz*, related to a simple mortgage, from which it appeared that it was the intention that the co sharers should have the right of pre-emption in all cases of mortgage, whether usufructuary or otherwise, and therefore a right of pre-emption accrued under the terms of the *wajib-ul-arz* in the case of a simple mortgage.

Per DUTHOIT, J., that a pre-emptive right was raised by the terms of the *wajib-ul-arz* only upon the occurrence of a transfer of a share in the property or the mahal, and a simple mortgage was not a transfer of property.

OLDFIELD, J.—The word "transfer" used in the *wajib ul-arz* was not intended to refer to a simple mortgage, but to mortgages where possession of the property passes to the mortgagee.

The obligors of a bond for the payment of money covenanted as follows :—"To secure this money, we have mortgaged a five gandas share out of a ten gandas share in each of the villages, *etc.* So long as the principal amount with interest is not paid, the hypothecated share will not be sold or mortgaged to any one"

Held (PETHERAM C J. dissenting) that the bond created a simple mortgage.

Per PETHERAM, C J ,—That the bond gave the obligee a charge only on the property.

THIS was a reference to the Full Bench. The facts which gave rise to it were as follow :—On the 5th August, 1881, the proprietors of 5 gandas shares in certain villages executed a bond for Rs. 1,597 in favour of Sheodihal Kuar and certain other persons, Mahajans, the terms of which, so far as they are material, were to the following effect :—"Now the total sum due to the aforesaid Mahajans is Rs. 1,597 : we promise and agree to pay this sum, principal, together with interest at 2 per cent. per mensem, on the 3rd May, 1882 ; we shall pay in full the principal together with interest at the aforesaid rate : to secure this money we have mortgaged (*rahn*) and hypothecated (*must ugrak*) a 5 gandas share out of a 10 gandas share in each of the mauzas Barigaon and Malhipur, with this condition, that so long as the principal amount with interest is not paid to the aforesaid bankers, the hypothecated share shall not be sold or mortgaged to any one, and if we do so, such act shall be invalid : we have therefore executed this hypothecation-bond that it may be of use when needed."

In June, 1882, Mahipal Kuar, who was a co-sharer in the same *thok* in which the share to which this bond related was situated, brought this suit against the proprietors of the share and the obligees of the bond. He alleged, *inter alia*, that the transaction, which appeared from the bond to be a mortgage, was really a sale,

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and the persons in whose favour the bond was executed, who were not co-sharers in the village, were in possession; and he claimed possession of the share, by right of pre-emption, and prayed that possession might be awarded to him either as a vendee or a mortgagee, according to the nature of the transaction. The right of pre-emption claimed was based on the *wajib-ul-arz* of the village. The clause in that document relating to the right of pre-emption is set out in the order of reference. The defendants, obligees of the bond, set up as a defence to the suit, *inter alia*, that possession of the share had not been transferred to them, the transaction not being a sale or usufructuary mortgage, but being, as evidenced by the instrument, a simple mortgage, and that a transfer by simple mortgage did not give rise to a right of pre-emption under the terms of the *wajib-ul-arz*. The Court of first instance (Subordinate Judge) dismissed the suit, holding, with reference to the terms of the instrument, that it created a simple mortgage, and that a transfer of that nature was not a transfer of the share, within the meaning of the *wajib-ul-arz*. On appeal the District Judge held that the terms of the *wajib-ul-arz* covered a transfer by simple mortgage; and, after remanding the case for the trial of certain issues, eventually gave the plaintiff a decree. The defendents appealed to the High Court, again raising the question whether, under the terms of the *wajib-ul-arz*, the plaintiff had a right of pre-emption in respect of the transaction evidenced by the instrument of the 5th August, 1881. The Divisional Bench before which the appeal came for hearing (STRAIGHT, Offg. C. J., and MAHMOOD, J.) referred the case to the Full Bench, the order of reference, which was dated the 7th May, 1884, being as follows:—

"This appeal has arisen from a suit for enforcement of pre-emption in respect of the rights conveyed under the deed of Sawan Sudi 10th, 1288 fasli (5th August, 1881). The deed is not very clearly worded, but both the lower Courts have rightly held that the contract therein contained constitutes hypothecation or simple mortgage, and that under the deed the defendants, mortgagees, have not been placed in possession. The lower appellate Court has also found on the evidence that at the time of the execution of the deed, the plaintiff 'was recorded co-sharer in the same *thok* as the mortgagors, and had therefore, under the terms

of the *wajib-ul-arz*, a preferential right of pre-emption as against the mortgagees.' These findings, which cannot be questioned in second appeal, furnish a complete answer to the third ground of appeal which impugns the finding of the lower Court as to the preferential right of the plaintiff.

"But, as his main argument in support of the appeal, the learned Pandit, who has appeared on behalf of the appellants, insists that, under the terms of the *wajib-ul-arz*, which governs the property in suit, mere hypothecation, unaccompanied with possession, does not give rise to a claim for pre-emption at all; and he contends that the Court of first instance, which dismissed the suit, laid down a sound proposition of law in holding that 'transfer of possession is an essential element of the right of pre-emption, and without such transfer the plaintiff pre-emptor has no right to sue, no transfer of possession having yet taken place.'

"This contention renders it necessary to examine closely the terms of the *wajib-ul-arz*, which relate to pre-emption. S 5 of that document may be thus literally translated:—'According to the proportion of the land or share in possession, every sharer has the power of transferring property by means of sale and mortgage. But it is a condition that, at the time of transfer, whosoever may be desirous of transferring property, then first his nearest sharer will be entitled, and in case of his refusal, the transfer will be made in favour of other sharers in that *thok*, and in case of their refusal, in favour of sharers in the other *thok*, and when all these refuse or decline to give the proper price, then the transfer may be made in favour of others, and then no sharer will have the right of pre-emption.'

"Now the argument on behalf of the appellants proceeds upon the assumption that the word 'mortgage' (*rahn*) must be understood to mean only 'mortgage with possession' (*rahn bil kabza*), and that the word 'transfer' (*intikal*) must be understood in the limited sense of such an alienation as by its very nature conveys the right of possession to the transferee. In support of this contention the learned Pandit has brought to our notice the interpretation placed upon this very clause of the *wajib-ul-arz* by a Division Bench of this Court (Oldfield and Brodhurst, JJ.) in the case

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of Achhaibar *versus* Sheoratan Kuar and others (S. A. No. 1260 of 1883, decided on 4th May, 1883), in which the learned Judges observed that 'the terms of the *wajib-ul-arz* do not give a right of pre-emption when property is merely hypothecated as security for a debt, and there is no transfer of possession of the land.'

"Having considered the point so raised, we have some difficulty in accepting the interpretation so adopted, and as the terms of the *wajib-ul-arz* in this case regarding the right of pre-emption are probably similar to the wording of the pre-emption clause of the *wajib-ul-arz* of many other villages in these Provinces, we think that the question is sufficiently important to be decided by the whole Court."

"We refer the following question to the Full Bench :—

"With reference to the terms of the *wajib-ul-arz* in this case, does the right of pre-emption arise by simple mortgage or hypothecation in which there is no transfer of possession of the land."

Pandit *Ajudhia Nath* and *Kashi Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and *Bishambar Nath*, for the respondent.

The Full Bench delivered the following judgments :—

DUTHOIT, J.—A pre-emptive right is raised by the terms of the *wajib-ul-arz* in this case only upon the occurrence of a transfer of a share in the property of the mahal ; and a simple mortgage, or mere hypothecation, is not, in my judgment, a transfer of property.

A transaction between borrower and lender by which, as in the case before us, the only covenant by the borrower, as regards the land, is that he will not sell or mortgage it elsewhere until the loan is repaid, is, in this part of India, commonly styled a "simple mortgage," and is so described in Mr. Macpherson's work on *The Law of Mortgage in Bengal and the North-Western Provinces*, ed. 1868, p. 10. By such a transaction the land is pledged as collateral security only. Its effect is to create a charge upon—not to transfer—the property. The latter effect can only result from such a transaction when the mortgagee has put his bond in suit, has obtained a decree upon it, and has executed his decree by bringing

the property to sale; and when that event occurs, the pre-empting co-sharer has his remedy. The transfer of the property may thus be long delayed, especially in the case of a loan conditioned for a term; and it is conceivable that meanwhile the co-sharers might remain in ignorance of the mortgage transaction. Certainly their communal relations would be in no way affected by it. The reason of the existence of a pre-emption clause in the administration-paper of a village is the avoidance of the unpleasantness which is likely to result from the intrusion of a stranger into the commune; and I fail to see how a mere hypothecation can give rise to such unpleasantness.

My answer to this reference must be in the negative.

BRODHURST, J.—With reference to the definition of simple mortgage, as given in Mr. Macpherson's work on Mortgages, and in s. 58 of the Transfer of Property Act, the deed of Sawan Sudi 10th, 1288 fasli (5th August, 1881), which was considered by the parties to the suit to be a deed of hypothecation or simple mortgage, was, I think, rightly held by the lower Courts and by the referring Bench of this Court to be a deed of that description.

Along with the *wajib-ul-arz*, prepared 22 years ago, is a statement showing the transfers that had, at or about that time, taken place in the village in question, and that statement is, together with the *wajib-ul-arz*, referred to in the settlement officer's order of the 15th August, 1862. One of the entries in the statement seems clearly to relate to a simple mortgage, and from these connected documents, which I now have had translated, I am satisfied that it was the intention that the co-sharers should have the right of pre-emption in all cases of mortgage, whether usufructuary or otherwise, and my answer to the reference is therefore in the affirmative.

OLDFIELD, J.—Referring to the bond with reference to which the right of pre-emption is claimed, I find that it declares that a sum of Rs. 1,597 has been borrowed and is due to the obligee, and the obligors bind themselves to pay this sum with interest on a certain date, and they covenant as follows:—"To secure this money, we have mortgaged a 5 gandas share out of a 10 gandas share in each of the villages Barigaon and Malhipur. So long as the principal amount with interest is not paid to the aforesaid bank

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ers, the hypothecated share will not be sold or mortgaged to any one, and if we do so, such act will be invalid; we have executed this hypothecation-bond that it may be of use when needed."

This instrument is drawn up in a not uncommon form, and is of a character which I believe has always been recognized by our Courts as creating a simple mortgage.

The Transfer of Property Act has now defined a mortgage to be "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability;" and a simple mortgagee is defined to be—"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds applied, so far as may be necessary, in payment of the mortgage-money, &c."

The right of causing the mortgaged property to be sold is to be exercised by recourse to the Civil Court, as is indicated by ss. 85 to 90 of the Act, except in the cases mentioned in s. 69.

It appears to me that the instrument comes within this definition of a simple mortgage. It transfers, as I think, an interest in immoveable property for the purpose of securing payment of money lent, which the borrower binds himself personally to repay; and there is impliedly a power given to cause the property to be sold to satisfy the debt, and the fact that the right of sale must be exercised through the Civil Court makes no difference; the terms of pledge and mortgage used necessarily imply a right of sale over the property, for the obvious intention of pledging the property as security for the debt is that the debt should be realized by its sale, and the instrument would be meaningless and the intention of the parties would be defeated on any other construction of it.

The case of *Shib Lal* v. *Ganga Prasad* (1) may be referred to to show that the Full Bench of this Court has held an instrument

(1) I. L. R., 6 All, 551.

of a similar character to operate to create a simple mortgage within the meaning of the Transfer of Property Act. I hold, therefore, that the bond creates a simple mortgage ; but I am nevertheless unable to hold that the plaintiff has a right of pre-emption in respect of it under the *wajib-ul-arz*. That document gives a right of pre-emption in respect of transfers by mortgage, but we have to see what was intended by such transfers, and I think the word used, which is translated "transfer", was not intended to refer to a simple mortgage, but to mortgages where possession of the property passes to the mortgagee. The object was to exclude strangers from coming in and meddling with the estate, and this does not happen in a case of simple mortgage.

When the property is ultimately sold under the order of the Civil Court, a right of pre-emption will arise, and the object of the shareholders can be obtained.

It seems, therefore, probable that the parties to the *wajib-ul-arz* had in view cases of mortgage where possession of the property was transferred to the mortgagee, and I believe our Court has in many other cases placed this construction on similar terms in the *wajib-ul-arz*. The answer to the reference should be in the negative.

PETHERAM, C. J.—The question which has been referred to the Full Bench does not, in my opinion, arise in this case, and before the answer can be given, the question must, I think, be amended. The question which does arise in the case is, whether, having regard to the nature of the security created by the bond dated 10th Sudi Sawan 1288, and the terms of the *wajib-ul-arz*, any right of pre-emption arose in the borrower's co-sharers upon his executing the bond. The answer to this question depends on whether the security created by the bond was a mortgage or a transfer within the meaning of the *wajib-ul-arz*. In my opinion it was neither the one nor the other.

By s. 58 of the Transfer of Property Act of 1882 a mortgage is defined to be a transfer of an interest in property for the purpose of a security, and a simple mortgage, which is the lowest form of security which can be defined as a mortgage, is defined to be where the borrower binds himself to pay the loan, and *gives the*

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lender a power to sell the property and pay himself in the event of the loan not being repaid when it becomes due. This transaction clearly includes the transfer of an interest in the property, as it transfers the right to sell it from the borrower to the lender.

A reference to s. 100 of the same Act shows that, according to the law of this country, immoveable property may be made the subject of a security by a transaction which may not be a mortgage, *i. e.*, by a transaction which does not transfer *to the lender* any interest in the land itself. The question then comes to this —Does the bond in question, either expressly or impliedly, *give the lender himself* any right to cause the property to be sold; or, in other words, to sell it himself, as, if it does not, it transfers no interest in the property, and is not a mortgage but a charge. I am unable to see that any such right is created or given by the bond; it is evident that no express right is created, and therefore it only remains to inquire whether one arises by implication from the nature of the transaction. I think that it does not. The strongest words in favour of such an implication are "mortgaged" and "hypothecated," and they must be read together with the other words by which the borrower agrees not to sell or mortgage the property to any other person until the bond is paid off. The meaning of this appears to me to be that the land is to *remain* in the hands of the borrower, subject to a charge upon it in favour of the lender, and, if this is the correct view, certainly no power to sell by the lender can be implied from such a state of things. It follows then that, in my opinion, the transaction in question amounted to a charge only, and not to a mortgage or transfer, and that the question as amended must be answered in the negative. It may be well to add that, in my view of the law, a simple mortgage, within the definition of the Transfer of Property Act, 1882, s. 58, would create a right of pre-emption under the terms of the *wajib-ul-arz*, because by giving the right to sell, it would transfer an interest in the property; but, as I have before said, I do not think that question arises in the present case.

MAHMOOD, J.—The question referred to us relates to the interpretation of the 5th clause of the *wajib-ul-arz*, a document which was executed in the Hindustani language by the co-sharers of the village at the time of the settlement of revenue. The clause relates

to the exercise of the right of pre-emption, and, in interpreting the words of the clause, it seems to me necessary to bear in mind the nature of the right for which the clause provides.

Sitting as a Judge of this Court, I have on more than one occasion expressed the view, that the rule of pre-emption owes its origin in India to the influence of Muhammadan Jurisprudence, which for centuries governed the administration of justice in this country. Though originally a mere rule of law administered by the Courts, pre-emption has been adopted as a custom by village communities in various parts of India. They have in some respects altered the incidents of that right, but such alteration has almost invariably been in the direction of strengthening the right, removing its limitations, and extending it far beyond the original contemplation of the rule of Muhammadan Law. That Law limits the exercise of the right of pre-emption strictly to cases of sale, whereby the ownership of property passes from one person to another; but in adopting the right, the village communities in India, prompted most probably by that feeling of exclusiveness and immissibility of character which the Hindu system of caste and joint family has engendered in the Indian mind, have extended the rule of pre-emption to mortgages of all kinds and even to *thika* leases, as is exemplified by some of the cases to be found in the reports. Bearing these matters in mind, it seems to me that the case now before us is only another illustration of the tendency to which I have referred: for here pre-emption is claimed, under the terms of the *wajib-ul-arz*, in respect of a transaction which, being only a simple mortgage, falls far short of sale, and does not involve the transfer of possession of the property to which it relates. It is true that in his plaint the plaintiff alleged that under the mortgage possession had been made over to the mortgagee, and the question has been decided against him by both the lower Courts. But the transfer of possession is by no means a condition precedent to the exercise of the right of pre-emption, even under the strict rule of Muhammadan Law,—a rule which, as I have already said, has been adopted by village communities by removing many of its restrictions. I am therefore of opinion that the circumstance that possession has not been transferred to the mortgagees is a circumstance which in itself has no bearing upon the decision

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of the question now before us. So long as the *wajib-ul-arz* provides the right of pre-emption in cases of all kinds of mortgage, the Courts must give effect to the terms of that document regardless of the question of possession.

This brings me to the consideration of the main question now before us. What is the exact meaning of the clause of the *wajib-ul-arz*? Does it give a right of pre-emption in respect of simple mortgages? The clause runs as follows:—"According to the proportion of the land or share in possession, every sharer has the power of transferring rights and interests by means of sale and mortgage. But it is a condition that at the time of transfer whosoever may be desirous of transferring rights and interests, then first his nearest sharer will be entitled, and in case of his refusal, the transfer will be made in favour of other sharers in that *thok*, and in case of their refusal in favour of sharers in the other *thok*, and when all these refuse or decline to give the proper price, then the transfer may be made in favour of others, and then no sharer will have the right of pre-emption" (1). In deciding this point it seems to me necessary to determine the exact meaning to be attached to three important words occurring in the clause of the *wajib-ul-arz*, *viz.*, "*intikal*" (انتقال), "*hakkiyat*" (حقیت), and "*rahn*" (رهن), and in determining their meaning, it seems to me that we are not called upon to enter into a philological discussion as to the origin and primary meaning of these words. The object of interpretation of documents of this nature is to ascertain the exact intention which the parties thereto had in using those words; and bearing this in mind, we are concerned only with the meaning of these words as they are used in the language of Hindustan. Now

(1) The original of the clause was as follows:—

بقدر قبضه زمین یا حصه هر ایک حصه‌دار کو اختیار انتقال حقیت
از روے بیع و رهن حاصل هی الا بر وقت انتقال کے یهه شرط هی که جس
کسي کو انتقال کرنا حقیت کا منظور هو تو اول حصه‌دار قریبي اُسکا مستحق
هوگا در صورت انکار اُسکے دیگر حصه‌داران تهوک کے هاتهه و بحالت انکار اُسکے
دوسرے تهوک کے حصه‌دار کے هاتهه انتقال کریگا — اور جب سب کوئي
انکار کرے یا قیمت واجبي ندے تو دوسرے کے هاتهه انتقال هو سکتا هی
پهر کسي حصه‌دار کو استحقاق شفع نه هوگا *

as to the word "*intikal*" (انتقال), the learned Pandit who has argued the case on behalf of the appellants insists that the word necessarily implies the passing of possession by virtue of an alienation; because, as he contends, the word is derived from the Arabic root "*nakl*" (نقل), which means change of place. I do not dispute the philology, but if the primary meaning of the root were to be the guide of interpretation, it seems to me that the word as used in this country would become meaningless in the majority of documents wherein it occurs; because, even according to the argument for the appellants, a usufructuary mortgage amounts to an "*intikal*" (transfer) of immoveable property. Now if the primary meaning of the word is accepted as the guide of interpretation, I have only to say that, when the owner of immoveable property executes a usufructuary mortgage, the property does not move, in the literal sense of the word "*nakl*", from one place to another, and that it does not therefore change places in the sense in which the learned Pandit interprets the word "*intikal.*" It is not contended that the word is used in the *wajib-ul-arz* in any sense peculiar to the locality where the document was executed; and I therefore take it that it is to be interpreted in the sense in which it is usually employed by the people of Hindustan. And taking this view of the matter, I have no hesitation in saying that the word "*intikal,*" as used in Hindustani, has the broadest meaning in connection with "*alienation,*" "*conveyance,*" "*assignment,*" or "*transfer*" of rights in immoveable property. I will not undertake to say which of these English words is the nearest equivalent, but I can say that, whichever of these words has the widest possible meaning, that word is the true equivalent of the Hindustani word "*intikal*"; at least I am not acquainted with any word which has a broader meaning in the sense of transfer of interest in immoveable property.

Now as to the word "*hakkiyat,*" the word is derived from the Arabic root "*haq*" (حق), the primary meaning of which is "truth." But it is not by that primary meaning of the word that I would interpret the *wajib-ul-arz*, for the word "*haq*", as it is used in Hindustani, means "right," and "*hakkiyat*" means that which is the subject of right, namely, rights and interests, in the legal sense of the phrase. Then the word "*rahn*" (رهن), which is another Arabic word.

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But we are not concerned with the meaning which it has among Arabians or under the Muhammadan Law. The only question we are concerned with is, what is the meaning of the word in the Hindustani language in which the clause of the *wajib-ul-arz* has been framed? It is to me as clear as the meaning of any word of my own language, that the word "*rahn*" is a generic word indicating all that is included in the English word "mortgage," as I understand the expression. The word is certainly not limited to usufructuary mortgages, but includes simple mortgages also—the former being in Hindustani "*rahn bil kabza*," and the latter "*rahn bila kabza*"; in other words, if the nature of the mortgage has to be specified, the expression "*with possession*" or "*without possession*" has to be employed to qualify the general expression "*rahn*" or mortgage.

Now I take it as a rule of construction that when general words are employed, they must be so understood, unless they are accompanied by any expression limiting and restraining their ordinary meaning, or unless such limitation or restriction arises from necessary implication. I have already said that neither the word "*intikal*" nor the word "*rahn*" can be understood in this document in any sense other than the most general; whilst the word "*hakkiyat*" has an equally general signification. Such being the view which I take of the meaning of these words, it becomes necessary for me to consider their effect with reference to the law of India. And upon this part of the case I have only to say a few words, because the codified provisions of s. 58 of the Transfer of Property Act (IV of 1882) have explained the law as it has always been in this country. I need not read that section; but I will only say that "mortgage," as understood in the Indian law, includes hypothecation or simple mortgage without possession, as well as usufructuary mortgage, which carries with it the right of possession, and that the one is as much "transfer of an interest in specific immoveable property" as the other, and that the purpose of both forms of mortgage is to secure the payment of money advanced as a loan to the person executing the mortgage. In my judgment in the case of *Gopal Pandey* v. *Parsotam Das* (1), to which the learned pleader for the respondent referred in the course of his argu-

(1) I. L. R., 5 All., 121.

ment, I dwelt at some length upon the conception which I have of the form of transfer known in India as hypothecation or simple mortgage without possession. I need not repeat what I then said, but I may briefly state the conclusions at which I then arrived, and to which I have ever since adhered. In this case we are not concerned with what is called an "English mortgage" in India. We have only to see whether the transaction now before us, which is one of the Indian simple mortgage, is in any jurisprudential sense distinguishable from usufructuary mortgage, so as to place the latter under the category of "*transfer*" of an interest in immoveable property, and to exclude the former from such denomination. I am anxious to address myself to this question, because an important part of the argument of the learned pleader for the appellants proceeded on the ground that, under the transaction which we are now considering, nothing was actually "*transferred.*" Now, according to my conception of legal rights, ownership is simply the aggregate sum of certain rights which constitute its component elements. Among those are the rights of possession and enjoyment of produce and the right of sale; in other words, a full owner of immoveable property has the power to alienate the right of possession and enjoyment of produce, as well as the power of transferring to another person the right of sale. It seems to me then that, when the owner of property borrows money or incurs any other pecuniary obligation, and, as security for the due performance of his engagement, gives a right in immoveable property as security, he may convey to his creditor such one or more elements of ownership as would secure the fulfilment of the pecuniary obligation. When he conveys the right of possession and enjoyment of produce, it is a usufructuary mortgage; when he, whilst remaining in possession, transfers the *right of sale*, the transaction amounts to a simple mortgage in India. In both cases the transaction involves the transfer of some one or more of the component elements of ownership; in both cases the transaction amounts to a *transfer*, called mortgage, because in both cases the object of the transaction is to secure the discharge of a pecuniary liability by transferring an interest in immoveable property. The purpose of the transaction in both cases is absolutely identical, though the *modus operandi* for securing that purpose is different.

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In the case of a usufructuary mortgage, the mortgagee obtains possession and realizes profits towards payment of the mortgage debt; in the case of a simple mortgage his right consists of achieving the same result by bringing the property to sale by such procedure as the law of the land provides. In some cases, such as those described in s. 69 of the Transfer of Property Act, the mortgagee may sell the property by private sale; in other cases (and this is the rule of simple mortgages in India) his only way of selling the property is to go to the Court to obtain an order for sale. I am of opinion that this distinction between the two forms of mortgage to which I have referred does not place them under different categories, for my conceptions of jurisprudence convince me that both must be classed under the *genus* of *jura in re aliena*, or estates carved out of the full ownership of property, the object, namely, security of immoveable property for the performance of a pecuniary obligation, being in both cases identical. For these reasons I hold that a simple mortgage, such as the one now before us, falls within the contemplation of the clause of the *wajib-ul-arz* which we are now considering, and that the right of pre-emption accrued under that clause to the plaintiff in this case when the simple mortgage, of which he complains, was executed by one of his co-sharers in favour of a "stranger," in the sense in which that word is understood under the law of pre-emption.

I wish to say a few words more on a minor point which was suggested in the course of the argument. It was said that a simple mortgage in this country can never result in sale without the intervention of the Court; that when such a mortgage is enforced there must be a decree of Court; that such decree would be executed by auction-sale; and that at such auction-sale a co-sharer like the plaintiff could enforce a right of pre-emption under s. 310 of the Civil Procedure Code. This may be so, but it does not seem to me to have the least effect upon the determination of the question now before us. Provisions somewhat similar to those of s 310 of the Civil Procedure Code are to be found also in s. 188 of the Land Revenue Act (XIX of 1873), but these statutory provisions confer pre-emptive rights wholly independent of the terms of the *wajib-ul-arz*, and I should say that they apply equally to cases in which the village community has entered into no such compact regard-

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ing pre-emption as in the present case. In the present case we are not concerned with the statutory pre-emptive rights of a bidder at an auction-sale either in execution of a decree or for arrears of Government revenue. We are concerned only with the rights of a co-sharer under the specific terms of the *wajib-ul-arz*, which imposes restrictions on the transfer of interests in the lands of the village. Moreover, we are not called upon to decide whether the policy of the rule of pre-emption in the form in which it is here claimed and provided by the *wajib-ul-arz* is in itself wise. The *wajib-ul-arz* is admittedly binding upon all co-sharers—certainly upon the parties to the present suit—and if that document provides pre-emption in respect of simple mortgages, as I hold that it does, we are bound to give effect to its terms.

My answer to this reference is in the affirmative.

APPELLATE CIVIL.

1884 *December 22.*

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

NAINSUKH RAI (PLAINTIFF) *v.* UMADAI (DEFENDANT)

Arbitration—Setting aside award—Corruption or misconduct of arbitrator—Revocation of submission to arbitration—Civil Procedure Code, s. 508.

An award cannot be set aside by the Court on the mere surmise that the arbitrator has been partial.

After the parties to a suit have agreed to refer to arbitration, and the order of reference has been made by the Court under s. 508 of the Civil Procedure Code, neither of them can arbitrarily and on no sufficient ground withdraw from the agreement.

Pestonjee Nussurwanjee v. *Manockjee & Co.* (1) followed.

THE plaintiff in this suit claimed to recover Rs. 720, principal and interest, from the estate of Ghasiram, deceased, in the possession of the defendant, his widow. In support of his claim the plaintiff produced his account-books, containing what was alleged to be an acknowledgment by the defendant of the debt. The Court of first instance dismissed the suit. The plaintiff appealed, and at this stage of the case the parties, by an application to the lower

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* Second Appeal No 1754 of 1883, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 11th September, 1883, affirming a decree of Muhammad Said Khan, Munsif of Muzaffarnagar, dated the 8th May, 1883.

(1) 12 Moo. I. A., 130.

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appellate Court (Subordinate Judge), dated the 12th July, 1883, agreed to a reference of the case to the arbitration of one Fakir Chand, and to abide by any decision which he might make. The Court, on the same day, directed that "orders should issue to the arbitrator, and he should be requested to submit his award by the 31st July, 1883." On the same day a formal proceeding was drawn up by the Court, addressed to the arbitrator, informing him that he had been nominated as arbitrator in the case, and requesting him to submit his award by the 31st July, 1883. On the 16th July, 1883, before this proceeding had issued to the arbitrator, the defendant (respondent) prayed that the agreement to refer to arbitration might be declared null and void, and the case decided on the merits by the Court, as the arbitrator was a connection of the plaintiff,—a fact which the defendant was not aware of when she consented to refer the case to his arbitration, and which the plaintiff had concealed from her. This petition the Court ordered to be filed. The case then went before the arbitrator, who, on the 21st August, 1883, made an award in the plaintiff's favour. On the 28th August, 1883, the defendant preferred objections to the award to the effect (*a*) "that the award was inadmissible, as the defendant had, before the records were sent to the arbitrator, declined to abide by his award"; (*b*) "that the award was also inadmissible because the arbitrator had exceeded his powers"; and (*c*) "that the arbitrator had been partial to the plaintiff, and had made an award against facts, as he was a relative of the plaintiff." The lower appellate Court framed the following issues on these objections, *viz.*: (i) "what is the effect of the respondent's revocation of her consent to the reference to arbitration before the award was made; (ii) whether or not the corruption or misconduct of the arbitrator is proved; (iii) did the arbitrator exceed his powers in determining the case?"

On the 1st and 2nd issues the Court decided as follows:—"As to the first point, the respondent's denial, after giving an agreement in writing, is insufficient. The only complaint which can now be made is whether or not the award has been made improperly owing to the corruption of the arbitrator; but this ground, given in the first issue, is not reasonable. (2) The plaintiff's relationship with the arbitrator is not denied. The rea-

sons given by him for his award are as follow :—That the defendant's signature corresponds with that on the account-book ; that the defendant's account-books were not produced, though called for; and that the defendant's husband's accounts were entered in the plaintiff's account-book. But he failed to determine and investigate the two important points whether the defendant's husband actually carried on dealings with the plaintiff, and that he, and subsequently the defendant, having stated the accounts, admitted the balance or not. When the arbitrator did not pay attention to these matters, the Court therefore suspects his impartiality, as it was not a case in which the arbitrator should have given a decree in a summary manner. The defendant and the plaintiff's gomashta, who up to this time very zealously conducted the case on behalf of the appellant, are on bad terms. The defendant is a childless widow possessed of property, and men like the plaintiff do not look upon her person and property without any reason. It is not strange if the present opportunity may have been afforded, through the plaintiff's karinda, by stating a person (inclined to favour) as a very trustworthy person, getting an agreement to refer to arbitration executed in his favour, and causing the arbitrator to give a judgment in accordance with the plaintiff's wishes. The arbitrator did not take the evidence of even one witness, nor did he make an equitable award. I am therefore of opinion that the award was not impartially made and should be set aside." The Court accordingly set aside the award, and proceeded to decide the appeal itself. It dismissed the appeal and affirmed the decree of the first Court.

In second appeal the plaintiff contended that the award had been improperly set aside, there being no evidence to prove corruption or misconduct on the part of the arbitrator, and the award having been impugned only on the ground that it was partial and opposed to the merits of the case; that the arbitrator had not exceeded his authority ; and that an award should not be set aside on the ground that the arbitrator had not determined the matters referred to him, but in such a case the procedure prescribed by s. 520 of the Civil Procedure Code should be followed.

For the respondent it was contended that the reference to arbitration had been revoked by her before the award was given, and therefore the award was invalid.

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Mr *G. T. Spankie* and Pandit *Ajudhia Nath*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The Subordinate Judge has rejected the award on the mere surmise that the arbitrator was partial, the grounds being that his decision is summary, and he failed to take evidence. An award can only be set aside for corruption or misconduct But there are no sufficient reasons for assuming corruption or misconduct; and in the absence of any evidence on these points the award cannot be set aside The defendant, after having agreed to refer to arbitration, and after the order of reference had been made by the Court under s. 508, could not arbitrarily and on no sufficient ground withdraw from her agreement (*Pestonjee Nussurwanjee* v. *Manockjee & Co*, 12 Moo. I. A. 130. The objection therefore on the defendant's part, that the reference had been revoked, fails. The decree is set aside, and the case will go back to the Subordinate Judge to determine the other objection taken to the award, and if it fails, to decree in accordance with the award: costs to follow the result.

Appeal allowed.

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CIVIL REVISIONAL.

Before Mr Justice Oldfield and Mr. Justice Mahmood.

RAGHUNATH DAS (PETITIONER) *v* RAJ KUMAR (OPPOSITE PARTY) *.

Civil Procedure Code, ss. 206, 622—*Order amending decree—High Court's powers of revision.*

Per OLDFIELD, J—When an original decree is amended under s. 206 of the Civil Procedure Code it as amended is the decree in the suit; and an appeal therefore lies from it under the provisions of s 540 when the validity of the amendment can be questioned. The matter of amending a decree under s. 206 does not by itself constitute a "case," within the meaning of s. 622 of the Civil Procedure Code, but forms part of the proceedings in the suit in which the decree is made.

Held, therefore, *per* OLDFIELD, J., that, where an original decree, which was appealable, was amended by the Court of first instance, under s. 206 of the Civil

* Application No. 216 of 1884, for revision under s 622 of the Civil Procedure Code of an order of Maulvi Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 6th May, 1884.

Procedure Code, the High Court had no power to revise such amendment under s. 622 of the Code

Per MAHMOOD, J.—An order passed under s 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and cannot alter its date, and such an order is not appealable under s 588 of the Code. Such an order, therefore, can be revised by the High Court, under s. 622.

IN this case a decree in a suit to enforce a right of pre-emption was passed by the Subordinate Judge of Bareilly on the 24th March, 1884, and the order contained in that decree as to costs directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. On the 18th April, 1884, the defendant applied to the Court to amend its decree in regard to costs, on the ground that the pleader's fees should be calculated with reference to the actual value of the property to which the suit related. On the 6th May, 1884, the Court passed an order as follows :—"In pre-emption cases fees should be calculated upon the actual value of the property, and not upon any other value. In preparing this decree, the value of the property was not regarded, and fees were computed on the amount of the claim. The decree should be corrected, and it is therefore ordered that the original decree be amended, and after the copy thereof has been amended, it may be returned to the applicant."

The defendant applied for revision of this order to the High Court. It was contended that the pleader's fees had been wrongly computed with reference to the actual value of the property, and that the amendment of the decree by the lower Court was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the petitioner.

Munshi *Sukh Ram*, for the opposite party.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgments :—

OLDFIELD, J.—We have no power of revision, under s. 622 of the Civil Procedure Code, in a case in which an appeal lies to the High Court. We are asked here to revise an order made under s 206 for amending a decree. Now the decree as amended is the decree in the suit, and therefore an appeal lies from it under the

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provisions of s. 540, when the validity of the amendment can be questioned. An appeal, therefore, in the language of s. 622 lies in this case to the High Court, and s. 622 has no application.

It cannot be said that the matter of amending a decree under s. 206 by itself constitutes a "case" within the meaning of s. 622; it seems to me to form part of the proceedings in the suit in which the decree is made, and those proceedings together form a case in which an appeal lies.

I would therefore dismiss this application with costs.

MAHMOOD, J.—I regret that I am unable to agree with my brother Oldfield upon the questions of law which this case involves. The facts which it is necessary to mention are that, on the 24th March, 1884, the Subordinate Judge of Bareilly passed a decree in a suit for pre-emption, and subsequently, on the 18th April, 1884, the respondent applied to the Court to amend its decree, on the ground that it was defective in not awarding costs in the manner required by the law in this part of the country. The Subordinate Judge took up the case under s. 206 of the Civil Procedure Code, and professing to act under the authority given by the last paragraph of that section, passed an order on the 6th May, 1884, which is the subject of the present application on the Revisional Side.

The power which the Court possesses of amending its decree was first created, at all events in the present extensive form, by the Civil Procedure Code of 1877, and it remained unaltered by the Code of 1882. But for this provision the Court of first instance could not, after passing its decree, interfere *suo motu* with the order contained therein in regard to costs, mesne profits, or any other matter connected with the suit. I have therefore no doubt that from the moment when the decree was passed, the Court became *functus officio*. Now it is necessary to examine carefully the terms of s. 206, which are as follow:—"The decree must agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, as stated in the register, and shall specify clearly the relief granted or other determination of the suit." The second paragraph imperatively requires the Court to frame its decree so as to

"state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid." In the case before us, the words of the last paragraph are specially important:—"If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion, or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment, or to correct such error: provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment." Now in this paragraph there are three important points. The first is, that the powers referred to may be exercised by the Court of its own motion; secondly, they may also be exercised by the Court at the instance of either party; thirdly, they cannot be exercised unless reasonable notice has been given to the parties. I understand the section to mean that when the Court or the parties to a suit consider that the decree is at variance with the judgment, the Court can only amend the decree after issuing such notice as may enable either party to prefer objections. The section would not have imperatively required the issuing of notice, if this proceeding under the section were not in the nature of an adjudication, separate from the decree sought to be amended.

A considerable part of the argument addressed to us by the learned pleader for the opposite party (respondent) related to the question whether s. 206 of the Code should not be regarded as merely ministerial, and whether a decree amended under the section must not be taken for the purposes of appeal, &c., as dating from the time when the amendment was made. I am of opinion that the contention has no force. In the first place it is specifically provided by the immediately preceding s. 205, that a decree shall date from the day on which the judgment was pronounced, and after it is duly signed it becomes, and must be regarded as a decree of that date. There is nothing in s. 206 to modify this imperative rule. Further, in s. 2 of the Code, a "decree" is defined as "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, *so far as regards the Court expressing it, decides the suit or appeal.*" Now I lay particular stress

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upon the last words which I have just read; and it appears to me that there is no force in the contention raised on behalf of the opposite party that the decree of the 24th March, 1884, did not decide the case, so as to make the Court *functus officio*. Once a judgment is pronounced and the decree prepared and signed within the meaning of s. 205 of the Civil Procedure Code, it becomes a final decree, which might form the subject either of an appeal or a review of judgment. It could not be interfered with, altered or amended by the Court which passed the decree, if the last paragraph of s. 206 did not confer the especial power of amendment to be exercised only after hearing the parties. I am therefore of opinion that the order passed under s. 206 was a separate adjudication, and not merely a part of the original decree, and could not alter its date. Then we have been referred to the case of *Gaya Prasad* v. *Sikri Prasad* (1), in which it was held that "an application to amend a decree which is found to be at variance with the judgment, in accordance with the provisions of s. 206 of the Civil Procedure Code, is an application of the kind mentioned in No. 178 of sch. ii of Act XV of 1877, and, as such, subject to the limitation of three years." And at the hearing it was said that this ruling made it impossible for the Court to amend its decree after three years. I do not agree with this. The Limitation Act relates to the action of parties, but not to the action of the Court. If the Court should be of opinion that by reason of any clerical or arithmetical error, its decree does not carry the judgment into complete effect, it may take up the decree and amend it even after three years or more. Under the provisions of the law as to revision, a decree cannot be revised if an appeal from it is possible. By s. 206, as I understand it, the Court has power to amend its decree, even if an appeal would lie therefrom, to this Court or to their Lordships of the Privy Council, and the time for the appeal had expired.

If we were to hold that this order of the 6th May, 1884, was not a separate adjudication, we should be deciding in effect that after several years had passed, and after the time provided for an appeal had long come to an end, the Court might take up its decree and so amend it as to seriously affect the rights of the parties whom it

(1) I. L. R., 4 All., 23.

concerned. Now we know that the only grounds recognized in s. 206 as justifying the Court in amending the decree are variance of the decree with the judgment, or clerical or arithmetical errors. But what happened in the present case was that the original decree, conformably with Rule 59 of the collected Rules of the High Court, awarded costs computed on the value of the amount claimed. The rule is as follows:—"The words, 'the amount or value of the claim' in Rules 55, 56, and 58, mean the value as set forth in the plaint, application, or memorandum of appeal, and where court-fees are payable *ad valorem*, according to which such court-fees are paid." The effect of this is that the costs in a suit like the present must be calculated in the same manner as court-fees upon a valuation of the claim. In the present case, therefore, the decree ordered costs in the manner prescribed, and that order has been interfered with, not on account of a clerical or arithmetical error, but because the Court believed that it was competent to pass an order which is inconsistent with the Rules which this Court has framed.

I am, therefore, satisfied that the order passed under s. 206 is a separate adjudication; that it is not appealable under s. 588; and that a Court which goes beyond what is warranted by the last paragraph of s. 206 may practically be altering the nature of the decree. If such a course were allowed, any Judge, who (as sometimes happens) took an erroneous view of his own judgment, might say: "I meant so and so by my judgment upon this point and upon that," and thus might make alterations going far beyond merely clerical or arithmetical corrections. The present petitioner could not appeal against the decree of the 24th March, 1884, for it would be contrary to his interest to do so. His only grievance is the order of 6th May, 1884, which wrongly amended the decree, and his only way to remove that grievance is by revision. The power of revision under s. 622 of the Civil Procedure Code belongs to the High Court only, and it was intended to be exercised in correction only of such errors as were not open to appeal, and within certain specified limits. Then it is argued that an order amending a decree under s. 206 of the Civil Procedure Code, whether such order is right or wrong, is not a "*case*" within the meaning of s. 622 of the Code, and is therefore not subject to revision.

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What I have already said fully meets this contention, and I may add that as a matter of practice the case of *Gaya Prasad*, to which I have already referred, shows that a Division Bench of this Court has taken cognizance of such orders in revision, although it dismissed the application upon grounds which do not apply to this case. Here the order as to costs complained of by the petitioner is admittedly erroneous and could be rectified only by revision. The order as to costs, as it stood originally in the decree of 24th March, 1884, was correct, and the order of amendment passed on the 6th May, 1884, was not justified by the provisions of s. 206 of the Civil Procedure Code, and was therefore *ultra vires*. I would set aside that order, and allow the application with costs to the petitioner.

APPELLATE CIVIL.

1885 *January* 15.

Before Mr Justice Oldfield and Mr. Justice Mahmood.

NANDA RAI AND ANOTHER (DECREE-HOLDERS) *v.* RAGHUNANDAN SINGH (JUDGMENT-DEBTOR) *

Execution of decree—Application by two of three joint decree-holders for part execution of joint decree—Limitation—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 179—*Acquiescence by judgment-debtor in part execution.*

A decree for money was passed in 1871, in favour of two persons jointly. In 1883, the decree-holders applied for execution thereof. By previous applications for execution made in 1875, 1877, and 1880, the decree-holders had sought to recover two-thirds of the amount of the decree.

Held that inasmuch as the previous executions of the decree by some sharers for their shares, whether strictly allowable or not, were allowed, and no objections at the time were taken to them, they were good for the purpose of keeping the decree alive, and that the judgment debtor could not now take exception to them as not being applications to enforce the decree within the meaning of the Limitation Act. *Mungul Pershad Dichit* v *Griya Kant Lahiri* (1) followed.

The decree of which execution was sought in this case, which was for money, and dated the 19th July, 1871, was passed in favour of Gopal Rai and Jeo Rai jointly. They sold it to three persons, named Sheodat Rai, Umar Rai, and Jageshar Rai. On the 29th November, 1873, these three persons applied for its execution. On the 5th February, 1874, the rights and interests of Sheodat Rai and Umar Rai in the decree were put up for sale in execution of a

* Second Appeal No 64 of 1884, from an order of H. D. Willock, Esq, District Judge of Azamgarh, dated the 1st March, 1884, affirming an order of Maulvi Aminud din, Munsif of Muhammadabad Gohna, dated the 22nd December, 1883.

(1) I. L. R, 8 Calc. 51; L. R., 8 Ind. Ap. 123

decree against them, and were purchased by Nanda Rai and Karta Rai, the appellants in this case. On the 2nd January, 1883, they made the application for execution of the decree out of which this appeal arose. In this they asked to recover two-thirds of the amount of the decree, as the representatives of Sheodat Rai and Umar Rai. The judgment-debtor objected that execution was barred by limitation. To this it was replied that the decree had been kept alive by applications for execution made by Nanda Rai and Karta Rai in 1875, 1877, and 1880. By those applications the decree-holders had sought to recover two-thirds of the amount of the decree.

The Court of first instance (Munsif of Muhammadabad) refused the application. It held on the authority of *The Collector of Shâhjahânpur* v. *Surjan Singh* (1) that, inasmuch as the previous applications were for the partial execution of a decree which was passed jointly against more persons than one, and which could only be legally executed as a whole for the benefit of all the decree-holders, they were not in accordance with law, and therefore were insufficient to keep the decree alive in terms of No. 179, sch. ii of the Limitation Act. On appeal, the District Judge affirmed the Munsif's order.

The decree-holders appealed to the High Court, contending that the previous applications had not been objected to by the judgment-debtor, and had been allowed, and therefore they could not now be impugned as being not in accordance with law.

Munshi *Kashi Prasad*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment :—

OLDFIELD, J.—Whether or not the previous executions of the decree by some sharers for their shares were strictly allowable, they were allowed, and no objections at the time were taken to them, and they must be held to be good for the purpose of keeping the decree alive. The judgment-debtor cannot now take exception to them as not being applications to enforce the decree within the meaning of the Limitation Act. The principle of the decision of the Privy Council

(1) I. L. R., 4 All., 72.

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in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) governs this case. The judgment-debtor cannot now object to the execution of the decree by the appellants for their shares. The orders of the Courts below are set aside, and the case remanded to the first Court for disposal. Costs to follow the result.

Appeal allowed.

1885 *January* 15.

Before Mr. Justice Oldfield and Mr. Justice Duthoit.

PRAGI LAL (PLAINTIFF) *v.* MAXWELL AND OTHERS (DEFENDANTS).*

Set-off—Civil Procedure Code, s. 111—"*Ascertained*" *sum—Act XV of* 1877 (*Limitation Act*), *s.* 22, *sch.* ii, *Nos.* 52, 53, 83.

A suit was brought by *P* against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November, 1879. The suit was brought on the 10th October, 1882. In January, 1883, the partners of the Elgin Mills Company were, on their own application, brought upon the record as defendants. The defendants claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October, 1879, and subsequently.

Held that art. 53, and not art. 52, sch. ii of the Limitation Act was applicable to the plaintiff's claim, the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed by the whole wood being supplied, or when the contract came to an end.

Held that although, taking the word "ascertained" to mean "liquidated," the claim of the defendants for damages would not come within the meaning of a set-off under s. 111 of the Civil Procedure Code, that section was one regulating procedure, and was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions; that the right of set-off would be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arose out of one and the same transaction, or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit, and that as, in the present case, the claim sprang out of the same contract which the plaintiff sought to enforce, and could readily be determined in the same suit, it was equitable that it should be so determined. *Gauri Sahai* v. *Ram Sahai* (2), *Kistnasamy Pillay* v. *The Municipal Commissioner of Madras* (3), and *Kishor Chand Champa Lal* v. *Madhowji Visram* (4) followed.

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* Second Appeal No. 1480 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 23rd July, 1883, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 3rd April, 1883.

(1) I. L. R., 8 Calc 51; L. R., 8 Ind. Ap., 123. (2) N.-W. P. H. C. Rep., 1875, p. 157.
(3) 4 Mad. H. C. Rep., 120. (4) I. L. R., 4 Bom., 407.

Held that the law of limitation applicable to the set-off was art. 83, sch. ii of the Limitation Act; that limitation would run from the time when the plaintiff was actually damnified, and should be reckoned to the date of the institution of the suit, and not to that of claiming the set-off, which was after the defendant's names were brought on the record; and that the set-off was therefore in time. *Walker* v. *Clements* (1) referred to.

Per OLDFIELD, J.—That the excess of the set-off in favour of the defendants over and above the claim of the plaintiff might properly be decreed to them, and that the set-off should be allowed, if at all, to its full extent, and not merely to the extent of defeating the claim.

Per DUTHOIT, J.—That although the set-off might properly be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, the defendants could not, failing the provisions of s. 111 of the Civil Procedure Code, be allowed to recover a sum of money from the plaintiff, they having paid no court-fees on that account.

Held that s. 22 of the Limitation Act refers to cases were a new defendant is substituted or added, and that when the partners of the Elgin Mills Company were brought on the record as defendants in January, 1883, there was no institution or addition of new defendants, the defendants having been comprised in the designation of Elgin Mills Company, and at most what was done was to correct a misdescription.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Mr. *T. Conlan* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Mr. *C. H. Hill*, for the respondents.

OLDFIELD, J.—This is a suit by the plaintiff against the partners of the Elgin Mills Company, for recovery of the price of wood supplied under two contracts dated the 22nd October, 1878, and 27th July, 1879. A certain amount of firewood was to be supplied by certain dates, and each contract contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for.

It is admitted that the plaintiff did not supply all the wood contracted for, and as a matter of fact the defendants did not keep him to the strict terms of the contracts, but received wood after the dates specified in the contracts had expired, and it appears that the plaintiff received payment for what he supplied from time to time,

(1) 15 Q. B. 1046.

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and on the 11th November, 1879, he presented a bill to the respondents for Rs. 1,367-10-9 alleged due to him on that date, and was met by a counter-claim on the defendants' part for a sum due for damages in consequence of his failing to supply wood. After that date no further wood was supplied, and it is admitted that the plaintiff failed to supply all the wood contracted for.

The present suit has been brought on the 10th October, 1882, to recover the above sum of Rs. 1,367-10-9 with interest.

There is no dispute that the above sum was due for wood supplied, but the defendants, who are proprietors of the firm, pleaded that they were made defendants after the period of limitation had expired for bringing this suit, that some of the items composing the claim are barred by limitation, and they claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for.

The lower appellate Court, modifying the decree of the first Court, has held that the plaintiff's claim is not barred by limitation, but that the set-off was properly claimable by the defendants, and in consequence it dismissed the suit. The plaintiff has appealed, and there are cross-objections on the part of the defendants. The plaintiff's appeal is directed against the order allowing the set-off, and it is contended that the claim for damages is not one which can be set-off under s. 111 of the Civil Procedure Code, it not being an ascertained sum of money legally recoverable.

Taking the term "ascertained" to mean liquidated, that is, in a claim for damages to mean a case where a certain sum has been agreed upon as the just amount of damages sustained, the claim will not come within the meaning of a set-off under s. 111; but it has been held by this Court in *Gauri Sahai* v. *Ram Sahai* (1), following a ruling of the Madras High Court in *Kistnasamy Pillay* v. *The Municipal Commissioner of Madras* (2), and by the Bombay High Court in *Kishor Chand Champa Lal* v. *Madhowji* (3), that this provision in the Code is one regulating procedure, and not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions, and that the right of set-off will be found to exist not only in cases

(1) N.-W. P. H. C. Rep., 1875, p. 157. (2) 4 Mad. H. C. Rep., 120.
(3) I. L. R., 4 Bom., 407.

of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit. And so, in the case before us, the claim springs out of the same contract which the plaintiff seeks to enforce, and can be readily determined in this suit, and it is equitable that it should be so determined.

There is another objection that the claim by way of set-off is barred by limitation, but this has no force. The loss which arises from the defendants being obliged to purchase coal in place of the wood not supplied was incurred on the 25th October, 1879, and subsequently. The law of limitation applicable is art. 83, and limitation will run from the time when the plaintiff was actually damnified, and will be reckoned to the date of the institution of the plaintiff's suit, and not to that of claiming the set-off, which was the 14th January, 1883, after the defendants' names were brought on the record,—see *Walker* v. *Clements* (1),—and the set-off is in consequence within time. The other plea that the defendants waived their right to damages is not made good.

The appeal of the plaintiff therefore fails. The first objection on the part of defendants is to the effect that, inasmuch as they were not made defendants till January, 1883, the suit is barred by s. 22, Limitation Act. It appears that the plaintiff made the Elgin Mills Company defendant, and upon the application of the defendants, who are the partners in the firm, they were brought on the record as defendants. S. 22 refers to cases where a new defendant is substituted or added. In the case before us there has been no substitution or addition of new defendants; the defendants were comprised in the designation of the Elgin Mills Company, and at most what was done was to correct a misdescription, for which the plaintiff cannot be blamed, seeing that the defendants trade under the designation of Elgin Mills Company, and he was not in a position to know who the partners were.

The next objection is, that all items of the claim for wood supplied prior to three years antecedent to the date of institution of

(1) 15 Q. B., 1046.

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suit are barred by art. 52, Limitation Act, the limitation running from the date of delivery of the goods.

It appears to me, however, that the intention of the parties was that the price of the wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed, by the whole wood being supplied, or when the contract came to an end. I would apply art. 53, and hold that no portion of the plaintiff's claim is barred by limitation. The objection on the defendants' part, however, that the Court below should have decreed in their favour the excess of their set-off over and above the claim allowed to the plaintiff is valid, for if it is right to allow a set-off at all in this suit, it seems reasonable that it should be allowed to its full extent, and not to admit it to the extent of merely defeating the present claim. It should be either allowed in full or not allowed at all, and I would so far modify the decree, and give a decree in favour of the defendants against the plaintiff for Rs. 1,808-5-6. There is no dispute in appeal before us either as to the amount of the plaintiff's claim or that of the defendants for damages.

The appeal of the plaintiff is dismissed. Each party to bear their own costs in both Courts.

DUTHOIT, J.—I am agreed with my learned brother upon all the points raised in this appeal and objection, except as regards the defendants' objection that their claim to recover the difference between the amount of the set-off and the sum found to be due to the plaintiff should have been decreed. I am not prepared to admit the validity of this claim. It is, I think, clear that, not being *liquida causa*, the set-off could not be claimed under the provisions of s. 111 of the Code of Civil Procedure; and this being so, though I am prepared to allow that the set-off may be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, I do not see how, failing the provisions of s. 111 of the Civil Procedure Code, the defendants, who have paid no court-fees on this account, can be allowed to recover a sum of money from the plaintiff. I would affirm the decree of the lower appellate Court, and dismiss the appeal and the defendants' objection, both without costs.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885
January 23.

BAKHSHI NAND KISHORE (JUDGMENT-DEBTOR) *v.* MALAK CHAND AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Sale of immoveable property in execution before thirty days from date of fixing up proclamation—Material irregularity in publishing or conducting sale—Civil Procedure Code, ss. 290, 311.

An infringement of the rule contained in section 290 of the Civil Procedure Code is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which section 311 refers

THIS was an appeal from an order of the Munsif of (Haveli) Aligarh confirming the sale in execution of a decree of certain immoveable property. It appeared that the property had been put up for sale before the expiration of thirty days, calculated from the date on which the copy of the proclamation was fixed up in the court-house of the Munsif. The judgment-debtor applied to the Munsif under s. 311 of the Civil Procedure Code to set aside the sale, on the ground that the requirements of s. 290 had not been complied with, and that this constituted "a material irregularity in publishing or conducting the sale," within the meaning of s. 311. The Munsif disallowed the objection and confirmed the sale. The judgment-debtor appealed to the High Court.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Babu *Oprokash Chandar*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The infringement of the rule in s. 290 of the Civil Procedure Code vitiates the sale. It is an illegality vitiating the sale and is something more than a material irregularity in publishing and conducting a sale to which s. 311 refers. The sale is set aside, and the appeal decreed with costs.

Appeal allowed.

* First Appeal No 68 of 1884, from an order of Mir Akbar Husain, Munsif of (Haveli) Aligarh, dated the 20th May, 1884.

1885
January 17.

FULL BENCH.

Before Sir W. Comer Petheram, Kt, Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

IN THE MATTER OF DURGA CHARAN, PLEADER, AND S. 12 OF ACT XVIII OF 1879.

Act XVIII of 1879 (*The Legal Practitioners' Act*), *s.* 12—*Conviction of Pleader of criminal offence—Case reported to the High Court—Argument allowed to show that conviction was illegal.*

A District Judge reported to the High Court for orders the case of a pleader who had been convicted of cheating under s. 417 of the Penal Code, and who, in the opinion of the District Judge, was unfit to be allowed to practice.

Upon the hearing of the case, counsel was permitted to go behind the conviction in order to show that the acts of the pleader did not amount at law to the offence of cheating.

THIS was the case of a pleader, who had been convicted of cheating, under s. 417 of the Indian Penal Code, which was reported to the High Court for orders, under Act XVIII of 1879. The District Judge making the report was of opinion tha tthe pleader was unfit to be allowed to practice.

It appeared that the pleader had been convicted of cheating by a Magistrate, and sentenced to pay a fine of Rs. 200. On appeal to the Court of Session, the conviction and sentence were affirmed, and an application for revision, which came before one of the Judges of the High Court, was rejected.

The District Judge's report of the case came before Oldfield and Mahmood, JJ, who, being of opinion that it was desirable that the case should be disposed of by the Full Bench, referred it accordingly to the Full Bench.

Mr. *T. Conlan*, for the accused.

Mr. *Conlan*.—If I am permitted to go behind the conviction, I can show that Babu Durga Charan committed no offence at law.

[PETHERAM, C. J.—I think you are entitled to go behind it in order to show that.]

Mr. *Conlan* then contended that the acts of Babu Durga Charan did not amount at law to the offence of cheating.

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At the conclusion of the argument, their Lordships delivered the following opinion :—

PETHERAM, C. J., and OLDFIELD, BRODHURST, MAHMOOD, and DUTHOIT, JJ.—We do not consider that Durga Charan, pleader, should be either suspended or dismissed under s. 12 of Act XVIII of 1879, and the Judge may be informed accordingly.

APPELLATE CIVIL.

1885
January 15.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

LACHMI NARAIN AND ANOTHER (DEFENDANTS) *v.* MANOG DAT (PLAINTIFF) *.

Pre-emption—Wajib-ul-arz—"Transfer"—"Sale."

On the 1st September, 1881, *L* and *R* entered into an agreement (which was duly registered) with *B*, that in consideration of their bringing a suit for recovery of a twelve-annas share in a village which *B* claimed by right of inheritance against *G*, they should receive a moiety of the share. *L* and *R* found funds for the prosecution of two suits in respect of the share, which on the 5th April, 1882, were compromised, *B* getting one anna and three pies out of the twelve annas originally claimed by her. In that compromise, *B* stated as follows :—"I make over one anna to *L* and *R* my partners, in lieu of the prosecution of the two cases. I, the plaintiff, shall remain in possession of the remaining three pies." Meanwhile, on the 3rd September, 1881, *G* had sold three annas out of the twelve annas share to *M*. On the 3rd April, 1883, *M* brought a suit against *L* and *R*, claiming the right of pre-emption in respect of the one anna which they had acquired from *B*, on the allegation that the transfer of the share had taken place on the 5th April, 1882. This claim was based on the *wajib-ul-arz* of the village, which gave a right of pre-emption to the co-sharers of any sharer wishing to "transfer" his share.

Held that the compromise of the 5th April 1882, was only a re-adjustment of the amount of the interest in the share between *B* and *L* and *R* : that the real transfer to *L* and *R* was given effect to on the 1st September, 1881 ; and that, this having been prior to the acquisition by *M* of any right in the village, he was not a co-sharer at the time of the transfer ; and that he had consequently no right as against *L* and *R* by way of claim for pre-emption.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of a one-anna share of a village under the following circumstances. On the 1st September, 1881, Bhagwanta, the daughter of Reoti Ram, who claimed as heir to her father a

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* Second Appeal No. 34 of 1884, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 27th August, 1883, reversing a decree of Sayyid Muhammad Mir Badshah, Munsif of Bansi, dated the 14th June, 1883.

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twelve-annas share in this village, together with her three sons, executed in favour of Lachmi Narain and Ramraj Lal, the defendants in this suit, an instrument in which, after stating that Bhagwanta was entitled to the share by right of inheritance to her father, that one Gajadhar had wrongfully taken possession of the share, that it was not possible to recover possession of the share without a suit, and that they had not the money to bring a suit, they agreed as follows :—

"Therefore we, while in the full possession of our senses and health, and without coercion on the part of anybody, have willingly agreed to make Lachmi Narain and Ramraj Lal our partners (*sharik*) to the extent of one-half in the twelve-annas share in the said village, and do hereby authorize them to institute a suit themselves against the said wrong-doer for the recovery of the said share, at their own cost, and to obtain a decree in respect thereof. After a decree is obtained in respect of the said share, whatever out of the said share is decreed by the Court itself, or by virtue of a compromise, or in any other way, shall be divided into halves, one-half to go to the said partners (*sharikdaran*), and the other to us. All the expense of recovering the said share, from the beginning up to the High Court, shall be borne by the said partners. We shall effect mutation of names in respect of the names of the said partners. We hereby further declare that we shall not, expressly or by implication, compromise with the said wrong-doer without the consent of the said partners. If we break any of the conditions herein contained, the said Lalas are at liberty to have recourse to law to obtain possession of the said share."

This instrument was duly registered. On the 3rd September, 1881, Gajadhar sold three annas out of the twelve-annas share to Manog Dat, plaintiff in this suit. On the 5th April, 1882, a suit having been instituted in the name of Bhagwanta against Gajadhar and certain other persons for the recovery of the twelve-annas share, that suit was compromised. By that compromise Bhagwanta obtained one anna and three pies of the twelve-annas share. In it, after stating that she was to take one anna and three pies of that share, she stated as follows :—

"I make over one anna to Lachmi Narain and Ramraj Lal, my partners (*sharikdaran*), in lieu of the prosecution of the two cases. I, the plaintiff, shall remain in possession and enjoyment of the remaining three pies. As to the one anna which I have transferred to my partners (*sharikdaran*), I declare that if I or my heirs raise any objection thereto, the said partners shall be competent to recover the costs incurred by them in prosecuting the said cases from me and my heirs."

The second "case" referred to in this compromise was a suit brought by certain persons against Gajadhar, Bhagwanta, and others, in respect of the twelve-annas share. This suit and Bhagwanta's suit were compromised on the same day.

On the 3rd April, 1883, Manog Dat instituted the present suit against Lachmi Narain and Ramraj Lal, claiming the right of pre-emption in respect of the one anna which they had acquired from Bhagwanta, on the allegation that the transfer of the share to the defendants had taken place on the 5th April, 1882. The suit was based on the *wajib-ul-arz* of the village. That document contained a clause in respect of the right of pre-emption, which was to this effect:—

"Every sharer has the power of transferring his share (*hissa*). But when he wishes to transfer, he must sell or mortgage the share, at a proper price, to his nearest sharer; in case of his refusal, the sale or mortgage may be made in favour of a sharer of the village; if he refuses, or does not give a proper price, then the sharer wishing to transfer may do so to whomsoever he likes."

The defence of Lachmi Narain and Ramraj Lal was that they became the owners of the one-anna share, in respect of which the right of pre-emption was claimed, on the 1st September, 1881, and not the 5th April, 1882, and therefore the plaintiff, who only became a co-sharer in the village on the 3rd September, 1881, had no right of pre-emption in respect of the transfer. The Court of first instance (Munsif of Bansi) allowed this defence and dismissed the suit. It observed:—"I am of opinion that the defendants acquired a right of ownership in respect of the one anna on the 1st September, 1881, the date on which the deed of partnership (*sharakat-nama*) was executed by Bhagwanta in

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favour of Lachmi Narain and Ramraj Lal. The deed of compromise, dated the 5th April, 1882, under which Bhagwanta Kuar assigned the disputed one-anna share to Lachmi Narain and Ram Lal out of the property which she had received under the said deed of compromise, in fact gave effect to the deed of partnership which had been executed on the 1st September, 1881." On appeal by the plaintiff, the lower appellate Court (Subordinate Judge of Gorakhpur) held that the ownership of the one-anna share was transferred to the defendants on the 5th April, 1882, and therefore the plaintiff, who became a co-sharer in the village previously, had the right of pre-emption.

The defendants appealed to the High Court, contending again that the share in respect of which the right of pre-emption was claimed had been transferred by the "deed of partnership" of the 1st September, 1881.

Mr. *G. T Spankie*, Munshi *Hanuman Prasad*, and Lala *Lalta Prasad*, for the appellants.

Munshi *Sukh Ram*, for the respondent.

The Court (PETHERAM, C. J., and BRODHURST, J.) delivered the following judgment :—

PETHERAM, C. J.—The plaintiff sued to enforce a right of pre-emption, and his right in the village was acquired on the 3rd September, 1881, by purchase and not by inheritance. He was not an old co-sharer, and, as regards the merits, there is no reason why he should succeed, not being such a co-sharer, unless he can show a preferential claim to the defendants. The question which arises is, whether the defendants had acquired rights in the village before the 3rd September, 1881. We are of opinion that they had, for the first interest which they acquired was on the 1st September, 1881, when they entered into an agreement with the female defendant that, in consideration of their bringing an action for recovery of her share, they should have a moiety. She thus by that agreement transferred, on the 1st September, 1881, one-half of what she was to get to them. The present defendants found funds for the two suits, which eventually were compromised, the Musammat getting a less share than she supposed. Then followed a re-adjustment of the amount of the interest in that share between her and the defendants,

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and they got a larger share of her interest than had originally been contemplated, but in reality a less share in the village. It cannot, however, be said that their right was not created till then. The real transfer was given effect to on 1st September, 1881, and the plaintiff has no right as against the defendants by way of claim for pre-emption.

The Munsif's judgment is correct and will be restored, this appeal being decreed with costs.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

1885 *January* 23.

KARIM BAKHSH (JUDGMENT-DEBTOR) *v.* MISRI LAL AND OTHERS (DECREE-HOLDERS).*

Insolvent judgment-debtor—Civil Procedure Code, s. 351 (*a*)—*Accidental false statements in application.*

Before rejecting an application by a judgment-debtor for a declaration of insolvency with reference to the provisions of s. 351 (*a*) of the Civil Procedure Code, it is necessary that the Court should be satisfied that the applicant has wilfully made false statements: unintentional inaccuracies are not sufficient grounds for rejection.

THIS was an appeal from an order of the District Judge of Gh'zipur rejecting an application under s. 344 of the Civil Procedure Code to be declared an insolvent. The application was rejected on the ground that the judgment-debtor had omitted to set forth in the application certain assets valued at Rs. 44,090-7-9, which were shown in his account-books, and therefore the statements contained in the application were not substantially true; and on the ground that he had fraudulently concealed a portion of such assets. The judgment-debtor stated in explanation of such omissions that the account-books were in the possession of his creditors. The District Judge was of opinion that this explanation was not satisfactory, because the account-books were in the court-house during the proceedings, and because in any case the judgment-debtor was not justified in filing accounts without making a serious effort to analyze his own accounts, or at least to explain why he did not do so.

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* First Appeal No. 102 of 1884, from an order of J. L. Denniston, Esq., Officiating District Judge of Ghâzipur, dated the 17th June, 1884.

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It also appeared from the account-books that a portion of these assets consisted of a sum of Rs. 2,702-11-3, which was in the hands of the judgment-debtor. He alleged that he had paid this sum to creditors, and called witnesses to prove the payments.

The District Judge decided "upon the facts and explanations and evidence" as follows:—

"The application must in any case be rejected under the terms of s 351, clause (*a*). It is not indeed to be asserted that the omissions in the statements in the application are in all cases fraudulent omissions. The fact that the accounts were accessible to the creditors supplied a certain antidote to their defects; and annoying and injurious to the creditors as the debtor's proceedings may have been, they do not in all cases come under the condemnation conveyed by s. 351 (*b*), or by any clause except s. 351 (*a*). Under that clause the debtor's statements, as a whole, are condemned, and the application is rejected.

"But further, the Court considers that the debtor has wilfully concealed a sum of Rs. 2,702-11-3 or some similar balance in his hands. As to his account of the transfer of this large sum without note or acknowledgment to the creditors, the Court holds his statement and that of his witnesses to be false. No such sum can be believed to have been paid in so reckless a manner. As to this sum, the petition is rejected under s. 351 (*b*)."

The judgment-debtor appealed on the ground, among others, that inasmuch as his account-books were not in his possession when his application was presented, it could not be said he had wilfully omitted to set forth the assets in question.

Munshi *Kashi Prasad*, for the appellant.

Lala *Lalta Prasad*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

OLDFIELD, J.—This application has been rejected with reference to the provisions of s. 351 (*a*) of the Civil Procedure Code, that the statements in the application were not substantially true. Before, however, rejecting his application, it is necessary that the Court should be satisfied that the applicant has wilfully made false

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statements: unintentional inaccuracies are not sufficient for rejection.

His explanation as to the omission of assets which were easily discoverable from the account-books, which were not in his possession when he made his application, may be accepted, and we cannot say that there is any sufficient proof of his concealment of the sum of Rs. 2,702 to which the Judge refers.

On a consideration of the evidence we find no sufficient reason why the applicant should not be declared an insolvent; and an order for appointing a receiver should be made.

The order of the Judge is set aside, and the case will go back, in order that the Judge may appoint a receiver of his property under s. 351. Costs will be paid out of the estate

Appeal allowed.

FULL BENCH.

1884 December 6.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

MAZHAR ALI AND OTHERS (PLAINTIFFS) *v* BUDH SINGH AND ANOTHER (DEFENDANTS).*

Missing person—Act I of 1872 (*Evidence Act*), *s.* 108—*Muhammadan Law—Act VI of* 1871 (*Bengal Civil Courts Act*), *s.* 24.

The rule contained in s. 108 of the Evidence Act governs the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Muhammadan Law is applicable

Per MAHMOOD, J —The rule of the Muhammadan Law that a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth is, according to the most authoritative texts of the Muhammadan Law itself, a rule of evidence, and not of "succession, inheritance, marriage, or caste, or any religious usage or institution", within the meaning of s. 24 of Act VI of 1871.

THIS was a reference to the Full Bench by Oldfield and Mahmood, JJ. The facts of the case and the points of law referred are fully stated in the order of reference which was as follows:—

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* Second Appeal No. 1496 of 1883, from a decree of C. W. P Watts, Esq, District Judge of Saháranpur, dated the 17th July, 1883, reversing a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Saháranpur, dated the 6th March, 1883.

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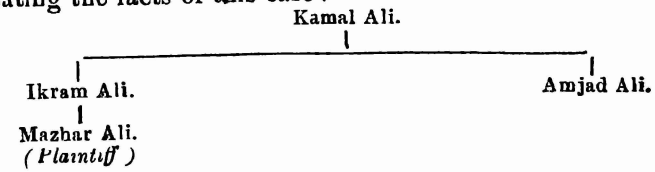
MAHMOOD, J.—The following genealogical table indicates the mutual relationship of the persons to whom reference is necessary in stating the facts of this case :—



The property, for half of which the plaintiff is now suing, originally belonged to Kamal Ali, who, on the 20th September, 1845, mortgaged it to one Jiwan Mal, and died in 1850, leaving his sons, Ikram Ali and Amjad Ali, as inheritors under the Muhammadan Law.

Ikram Ali died in 1854, leaving his son, Mazhar Ali, the plaintiff, as inheritor, who, on the 13th February, 1864, sold the equity of redemption, which he had inherited from his father, to Narain Das, represented in this litigation by the defendants.

Narain Das, as the owner of a moiety of the mortgaged property, redeemed it in 1864, and obtained possession of the whole mortgaged property.

It is admitted in this case that Amjad Ali left his home in 1858, and has never been heard of since ; but the plaintiff, whilst making this statement, made another inconsistent statement, that the missing person had died in 1875.

This latter part of the plaintiff's allegation has, however, been found to be unsupported by any evidence. The defendants, however, themselves stated, that in 1858, when Amjad Ali left his home, he was only thirty years old, and it is not disputed that Mazhar Ali, plaintiff No. 1, is the heir of Amjad Ali, under the Muhammadan Law.

Mazhar Ali, plaintiff No. 1, has sold half this right, said to have been inherited by him from his uncle, Amjad Ali, to the other two plaintiffs in this case.

The plaintiffs, alleging that the mortgage under which the defendants hold the property has been redeemed from the usufruct, leaving a surplus of Rs. 336-8-0 as mense profits for the last three years, came into Court suing for possession of the share

left by Amjad Ali, and for recovery of the above-mentioned sum as mesne profits.

The suit was resisted by the defendants on many grounds, only one of which need be noticed here. They pleaded that, as ninety years had not elapsed from the date of Amjad Ali's birth, he, although missing ever since 1858, must be presumed to be still alive under the Muhammadan Law, that no devolution of inheritance had therefore taken place in favour of Mazhar Ali, plaintiff No. 1, and therefore the plaintiffs had no *locus standi* to come into Court.

The Court of first instance, applying the rule contained in s. 108 of the Evidence Act, held that Amjad Ali must be presumed to be dead, and added the opinion that even "if the plaintiff's ancestor is only missing, still the plaintiff is entitled to possession of the property as a trustee, and the defendant has no right to object." Then, after going into the merits of the case, that Court decreed the claim under conditions which need not be specified here.

On appeal by the defendants, the learned District Judge has reversed the decree of the Court of first instance. Following the ruling of this Court in *Kalee Khan* v. *Jadee* (1), he held that, under the Muhammadan Law, the heirs of a missing person are not as such entitled to divide his estate among themselves, either as a trust or otherwise, before his death, natural or legal. The learned Judge then goes on to say :—"By s. 103 of the Evidence Act, the burden of proof was on the plaintiff to prove Amjad Ali's death, and I consider that he has certainly failed to prove it. S. 108 will not apply as the case is one governed by the Muhammadan Law, not by this section of the Evidence Act."

The plaintiffs have preferred this second appeal, and the learned counsel who has appeared on their behalf contends that the rule in regard to presumption as to the death of a missing person, being purely a rule of evidence, is not affected by the Muhammadan Law, and must be governed by s. 108 of the Evidence Act. He also contends that, even if the missing person be treated as alive, the plaintiff, Mazhar Ali, is entitled to the property under

(1) N.-W. P. H C. Rep., 1873, p. 62.

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the Muhammadan Law, as the heir of the missing person, and that as such he is entitled to recover either from a trespasser, or to redeem it from a mortgagee, whose mortgage has been paid off from the usufruct of the mortgaged property.

This contention, which is resisted by the learned pleader for the respondents, raises questions of considerable importance. The course of rulings of this Court, and we believe of other High Courts also, as well as of the Sadr Diwani Adalats, has been to apply the rule of Muhammadan Law regarding missing persons to all cases of this nature, and no ruling has been pointed out to us which definitely lays down any rule as to the rights of the heirs of a missing person in respect to recovering possession of his property in the capacity of trustees for such missing person. S. 24 of the Civil Courts Act (VI of 1871), which only re-enacts much older statutory provisions, lays down that in cases of "succession, inheritance, marriage, or caste, or any religious usage or institution, the Muhammadan Law, in cases where the parties are Muhammadans.....shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished;" whilst cl. (1) of s. 2 of the Evidence Act clearly lays down that "all rules of evidence not contained in any Statute, Act, or Regulation in force in any part of British India" shall be repealed. The rule of Muhammadan Law regarding missing persons is one which necessarily affects questions regarding succession, inheritance, and marriage, for in all these branches of rights the death of a missing person may be the turning point of adjudication. At the hearing our attention was called to the following rulings of this Court, which partially support the contention of one party on the one question, and of the other party on the other:—*Dowlut Khatoon* v. *Khaja Ali Jan* (1); *Kalee Khan* v. *Jadee* (2); *Parmeshar Rai* v. *Bisheshar Singh* (3); *Hasan Ali* v. *Mahrban* (4); and *Girdhari Lal* v. *Lado Begam* (5). So far as the question of the ninety years' rule as to missing persons is concerned, the effect of these rulings is to support the respondents' case, whilst on the question of the right of legal heirs to claim as trustees, the ruling in *Dowlut Khatoon* v. *Khaja Ali Jan* (1) inclines to favour the appellants'

(1) N.-W. P. H. C. Rep., 1867, p 59.
(2) N.-W. P. H. C. Rep, 1873, p. 62.
(3) I. L. R., 1 All, 56.
(4) I. L. R., 2 All., 625.
(5) Weekly Notes, 1882, p. 105.

contention. On the other hand, a Division Bench of this Court consisting of Stuart, C. J., and Turner, J., in the unreported case of *Nur Muhammad* v. *Habibunnissa*, distinctly applied the rule contained in s. 108 of the Evidence Act to questions of this nature, holding at the same time that " when a person is missing, the Kazi should make over the property to a trustee, to be retained for the missing person until ninety years have elapsed from the birth of the missing person."

Having examined these various rulings, we are of opinion that they do not definitely settle the questions which have arisen before us, whilst the rulings which preceded the passing of the Evidence Act are of small value, in view of the fact that no such enactment existed before the passing of that Act as specifically repealed all rules of evidence followed by the Courts.

We refer the following questions to the Full Bench :—

(i) Does the rule contained in s. 108 of the Evidence Act govern the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of the Bengal Civil Courts Act (VI of 1871), the Muhammadan Law is applicable?

(ii) When a Muhammadan owner of property is missing, are his immediate heirs entitled, during his absence, to claim possession of his property as trustees on his behalf from trespassers, or to sue for redemption of such property from a mortgagee in possession?

Mr. *T. Conlan* and Shaikh *Maula Bakhsh*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

Mr. *T. Conlan*, for the appellants.—The rule of the Muhammadan Law is that a person must be presumed to be dead when he has been missing for a period of ninety years, counted from the date of his birth. The question whether a man is dead or not is a question of evidence, and the presumption of law just stated is a rule of evidence, and not a rule of succession or inheritance, or the other matters referred to in s. 24 of the Civil Courts Act. In order, therefore, to determine, whether or not a man who is missing is dead, the rule contained in s. 108 of the Evidence Act,

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and not the Muhammadan Law, must be followed. [He was stopped.]

Munshi *Kashi Prasad*, for the respondents.—The question merely whether a man is alive or dead may be one of evidence, but the question whether the heirs of a missing person have acquired a right by inheritance to his property is a question of succession, and, when such a question arises between Muhammadans, it must be determined according to the Muhammadan Law, by virtue of s. 24 of the Civil Courts Act.

Mr. *T. Coulan*, in reply.

The following judgments were delivered by the Full Bench:—

MAHMOOD, J.—It appears to me that the first question which has been referred to us by the Division Bench cannot be decided without determining whether the rule of Muhammadan Law, that a missing person is to be regarded as alive till the lapse of ninety years from his birth, is a rule of the Muhammadan Law of "succession, inheritance, marriage, or caste, or any religious usage or institution" within the meaning of the Bengal Civil Courts Act (VI of 1871). This, I think, is the first and necessary step in the reasoning which would lead to the answer we are called upon to give to this reference. If the rule forms part of the branches of law which I have mentioned, there can, I think, be no doubt that by the provisions of the Statute we are bound to decide the question according to the strict rules of the Muhammadan Law, whether or not such rules appear to us reasonable and adapted to the exigencies of modern life in this country. On the other hand, if such is not the case, the question must be determined according to the general law of British India. The provisions contained in s 24 of the Bengal Civil Courts Act constitute one of the most important guarantees given to the people of India by the British rule, and they date as far back as the beginning of the British rule itself, for they first found legislative enactment in the year 1780, when the first Regulation for the administration of justice was enacted by the Bengal Government; they have been repeatedly confirmed by Acts of Parliament, and have ever since remained in the statute-book of British India. And I think I may safely say that, ever since those provisions were first enacted, the

Courts of Justice have been uniformly accustomed to regard the rule of Muhammadan Law as to missing persons as a rule forming an essential part of the Muhammadan Law of inheritance, succession, and marriage. It is not necessary to cite authorities for this proposition, and I have mentioned the circumstance simply to indicate the importance which must be attached to the question we are called upon to determine,—a question which affects the devolution of property owned by the entire Muhammadan population living within the jurisdiction of the Courts of Justice in British India. And because the question is one of so much significance, because by a long course of decision the Muhammadan Law has been held to govern it, and the people are in consequence accustomed to regard it as a rule binding upon the Courts, and because my own views on the subject are at variance from those which have hitherto been adopted in the cases to be found in the reports, I consider it necessary to refer to the original authorities of Muhammadan Law, in order to show, in the first place, that the rule which we are now considering is, according to the best recognized and most authoritative texts of the Muhammadan Law itself, neither a rule of inheritance, nor of succession, nor of marriage, and that the Muhammadan jurists themselves have regarded it as a rule belonging to that department of procedure which regulates the ascertainment of facts in judicial tribunals. In the second place, I shall deal with the argument which has been addressed to us regarding the effect which the provisions of the Evidence Act have upon the decision of the question.

Now, first as to the Muhammadan jurisprudence itself. It is a matter of the history of Muhammadan Law that when the Republic founded by the Prophet became an empire under the Khalifas of Baghdad, the exigencies of administration necessitated the establishment of Courts of Justice, for decision of disputes, and it was about that time that the jurists and doctors of the law endeavoured to frame a system of jurisprudence by supporting it with reasons deduced from those logical methods which the Arabian schoolmen had borrowed from the ancient philosophers of Greece. It was in consequence of this that the earliest systematized text-books of Muhammadan jurisprudence were written, and by the concurrence of generations of jurists, principles and maxims were for-

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mulated and accepted as guides for judicial decision. Among the maxims which were thus established is the maxim, "*Certainty is not over-ridden by doubt* (1)", which, says the author of the *Ashbah*, the most celebrated treatise on maxims of Muhammadan Law, "has been explained by some doctors to mean that the requisitions of certainty are not removed by doubt (2)." The author goes on to say :— "In this maxim are included various rules, one of which is, that original condition is continuance of what was in the same state as it was (3)." This rule, which I have literally translated, is technically called *istis-háb*, and it is thus dealt with by the same author under the maxim which I have just cited. "The second benefit," says the author, "derived from the maxim relates to *istis-háb*, which means (as in the Tabrir) that a thing ascertained exists till there is *probability* of its extinction. There is a difference of opinion whether the rule can be employed as an argument by a claimant. Some hold that it is an absolute argument, while many altogether deny its efficacy. But the three profound doctors, Abu-Zaid, Shamsul-Aimma, and Fakhrul-Islám Bazdawi, hold that the rule may be employed as an argument in defence but not in attack, (that is, in resisting a claim but not in seeking a right), and this doctrine has been generally accepted by the lawyers..... Another outcome of the maxim is, that a missing person neither inherits nor is he inherited from (4)." Fakhrul-Islam Bazdawi (to whom the author of the *Ashbab* has referred), in his celebrated book entitled the *Principles of Jurisprudence* has treated the rule in the chapter on analogical presumptions in these words :—"But employing *istis-háb-alhal* (continuance of condition) as an argument is correct according to Shafei, and this applies to all matters

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(1) اليقين لا يزول بالشك

(2) حقق بعض المحققين إن المراد لا يرتفع حكم اليقين *

(3) يندرج فى هذه القاعدة قواعد منها قولهم الاصل بقاء ماكان على ماكان *

(4) الفائدة الثانية فى الاستصحاب هو كما فى التحرير الحكم ببقاء امر محقق لم يظن عدمه واختلفوا في حجيته فقيل بحجيته مطلقا و نفاه كثير مطلقا و أختار الفحول الثلثة ابوزيد و شمس الائمة و فخر الاسلام إنه حجة للدفع لا للاستحقاق و هو المشهور عند الفقهاء ..... و مما فرع عليه المفقود فانه لايرث عندنا ولايورث *

the necessity whereof is established by reason, and then doubt arises as to the discontinuance of those matters. In such cases the rule of *istis-hâb* holds good, so that it may be used against the opposite party. And according to us it cannot be an argument of proof on behalf of a claimant, but an argument in defence; and on this (principle) are grounded the doctrines of our doctors.....for example, the life of a missing person 1."

So far as to the rule of *istis-hâb*, which, as is abundantly apparent from these texts, is a rule of the Arabian system of reasoning as applied to legal questions. The exact manner in which the rule has been applied to the subject of missing persons is most fully explained in *Birjandi*, whose authority is undoubted among Muhammadans. "A missing person," says the author, "is one whose trace is unknown, which means that his whereabouts, life, or death, be unknown, that is, all news about him be intercepted, and it be unascertainable whether he is dead or alive. Such a person is regarded as alive regarding his own rights, because it is certain that he was alive at one time, and this presumption of continuance (*istis-hâb*) will apply till the contrary becomes apparent. His wife cannot marry, because, if she were to marry, it would necessarily imply his being dead, whereas the former marriage, being a certainty, cannot be destroyed by doubt. Nor will his property be distributed among his heirs, nor his contracts set aside, because these would also necessarily imply his being dead. The *Kazi* may appoint a person to take possession of his rights and protect his property, whether the heirs demand this or not, because in this is advantageous protection to him. He is regarded as dead in regard to rights of others, and does not therefore inherit, because to regard him as capable of inheriting would be to hold that proved which cannot be proved. Therefore the *dictum* that a missing person does not inherit has been explained to mean that his share in the property of his ancestor is to be held in suspense, because there is a possibility of his being alive till the expiration of ninety

(1) اما الاحتجاج باستصحاب الحال فصحيح عند الشافعي و ذلك في كل حكم عرف وجوبه بدليل ثم وقع الشك في زواله كان إستصحاب حال البقاء على ذلك موجبا يصح الاحتجاج به على الخصم و عندنا هو لا يكون حجة للايجاب لكنه حجة دافعة على ذلك دلت مسائلهم ..... كحيوة المفقود

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years from the time of his birth. This doctrine has been adopted by Imam Abubakr Muhammad Ibn-ul-Fazl, and has been approved by Sadrul-Shahid as mentioned in the *Khulasa*. Hasan-ibn-i-ziad held that the missing person should be declared defunct after the expiration of one hundred and twenty years from his birth, whilst Abu Yusuf maintained that one hundred years was the period, because in modern times no one lives longer. According to my own view the true doctrine is, that a missing person should be declared defunct when none of his coevals remains alive. This rule has been adopted in the *Zahiriya*. Then it is said that the proper period is when his coevals in all the towns are dead, but the more correct opinion is that when his coevals in his own town are dead. Some learned doctors hold that his property will be held in suspense till, in the opinion of the Imam, he is to be considered dead, and that when such period has elapsed as the *Kazi* thinks is more than the usual age of persons like the missing person, then he will be declared defunct. Others maintain that the proper period is seventy years, Muhammad maintains one hundred and ten years, and Abu Yusuf one hundred and five ; but these two sayings are not to be found in celebrated works, as stated in the *Zaul Faraiz Sirajiya*. In the *Zakhira* it is stated that Hanifa estimated the period at eighty years, and in the *Fusul Imadiya* it is said that he hesitated in this matter. In the *Hedaya* it is said that the most reasonable doctrine is that the term should not be fixed at any particular estimate, and that the benevolent doctrine is to fix it at ninety years. Upon the expiration of the term, the property of the missing person will be distributed among his heirs, such as are alive at the time, because he must be regarded as having then died, and therefore those who died before do not inherit from him. As to his rights to the property of others, he is to be regarded as dead from the day he has disappeared, because by the rule of *istis-hâb* (continuance) his life must be presumed, and the rule is an argument for resisting a claim, though not for enforcing a right. For this reason he cannot inherit another's property (1)." Rules similar to those contained in this

(1) المفقود غائب لم يدر امره ..... والمراد منها موضعه و حيوته و موته اى انقطع خبره بحيث لم يعلم انه حى او ميت حى فى حق نفسه

text are to be found in the *Hedaya*, Book XIII, which relates to the subject of *mafkoods* or missing persons; but I need not quote much from that celebrated treatise, because the labours of Mr. Hamilton have rendered the book accessible to English readers. I may, however, mention the circumstance, that the author of the *Hedaya* lays it down as the opinion of Imam Malik, one of the great founders of Muhammadan jurisprudence, that "at the expiration of four years the *Kazi* may pronounce a separation, after which the wife is to observe an *iddat* of four months and ten days, such being the *iddat* of widowhood, and she may then

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حكما لانا علمنا حيوته بيقين فيستصحب ذلك مالم يظهر خلافه فلا ينكح
عرسه اذ لو نكحت لكان فيه حكم بموته والنكاح ما كان معلوما بيقين فلا يزول
بالشك ولا يقسم ماله بين ورثته ولا يفسخ اجارته لان فى كل منهما حكم بموته
ضمناً و يقيم القاضى من يقبض حقه و يحفظ ماله سواء طالب الورثة ذلك او لم
يطلبوا إذ فى ذلك نظر له ميت فى حق غيره فلا يرث من غيره فان فى
توريثه من الغير اثبات امر لم يكن ثابتاً له ثم قد فسر قوله لا يرث المفقود من
غيره اى توقف قسطه من مال مورثه لان حيوة المفقود محتملة الى تسعين
سنة من زمان ولادته و اختاره الامام ابوبكر محمد بن الفضل قال الصدر الشهيد
و عليه الفتوى كذا فى الخلاصه و كان الحسن بن زياد يقول اذا تم له مائته و
عشرون سنة من يوم ولد يحكم بموته و عن ابى يوسف إنه مائه سنة لان الظاهر ان
احد لا يعيش فى زماننا اكثر منه والمذهب عندنا إنه اذا لم يبق احد من اقرانه
حيا فانه يحكم بموته كذا فى الظهيريه ثم قيل المعتبر اقرانه فى جميع البلدان
والاصح إن يعتبر إقرانه فى بلده و قال بعضهم يوقف ماله إلى إجتهاد الامام فى
موته فاذا مضى مدة يقضى لقاضى بان مثله لا يعيش باكثر من مدة المدة حكم
بموته وقال بعضهم إنها سبعون سنته و عن محمد انها مائة و عشر و سنه و عن
ابى يوسف إنها مائة و خمس سنين و هاتان الروايتان لم يوجد فى الكتب المشهورة
كذا فى صوم الفرائض السراجيه و فى الذخيرة إن فى قول ابى حنيفه يقدر ثمانين
سنة و فى الفصول العماديه إن ابا حنيفة توقف فى ذلك و فى الهدايه الاقيس
ان لا يقدر بشئى والارفق ان يقدر بتسعين ..... و يقسم ماله بين ورثة
الان يعنى ورثة الموجودين فى ذلك الوقت الذى تمت المدة فيه كانه مات فى
ذلك الوقت و من مات قبل ذلك لم يرث منه و فى مال غيره اى يحكم
بموته فى كل حق تعلق بغيره من حين فقد لان حياته باستصحاب الحال
وهو يصلح حجة لدفع الاستحقاق لا للاستحقاق فلا يستحق ميراث
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marry whoever she pleases; because Omar thus decreed with respect to a person who disappeared from Medina (1)."

Now, whilst Imam Malik maintains that the short period of four years is sufficient to raise the presumption of death of the missing person, the followers of the school of Imam Abu Hanifa are far from being unanimous as to the exact period necessary for raising the presumption. I can illustrate this best by reading a passage from the *Fathul Kadir*, a most celebrated commentary on the *Hedaya*:—

"Shaikh Imam Abubakr Muhammad Ibn-i-Hamid has adopted the term of ninety years, because that is the probable age in our time. But this reason is not correct unless it be taken that the majority of long lives among people of our time do not exceed that limit. This may be so, but the moderns who have adopted sixty years have based the rule on the ground that that is the probable limit of age. In short, the disagreement has arisen from the difference of opinion as to whether the rule should be adopted according to the majority of long lives or of ordinary lives. In view of this, Shamsul-Aimma has said 'the most proper course according to legal methods is, that no estimate should be fixed, because it is impossible to fix any estimate by opinion, and this is what the author (of the *Hedaya*) means by saying *the most reasonable* (*course*). But we maintain that when none of the missing person's coevals remains (alive), he will be declared dead, regarding him in the condition of those like him'. This opinion is with reference to the *Zohirur-Riwayat*. The author (of the *Hedaya*) says that the most benevolent (opinion) for mankind is, that it (the period) should be fixed at ninety years, whilst it would be more benevolent to fix it at sixty years. In my opinion the best is seventy years, because the Prophet said, 'the ages of my people are between sixty and seventy years,' and therefore the longest of the two is the most probable. Some doctors maintain that the question should be

(1) قال مالک اذا مضی اربع سنین یفرق بینه و بین إمراته تعتد عدة الوفاة ثم تزوج من شاءت لان عمر رضی الله عنه هکذا قضی فی الذی إستهواه الجن المدینة و کفی به إماما *

delegated to the opinion of the Judge who, when he considers proper, should declare a missing person defunct (1)."

I must quote one more passage from the *Fatawa-i-Alamgiri*, which explains the rule of Muhammadan Law on the subject in brief terms, and with a precision not to be found in other works. I am all the more anxious to cite this authority because the work, which is a monument of the industry of the Muhammadan lawyers, was prepared under the orders of the Emperor Aurangzeb, and was promulgated in India as the great Code of Muhammadan Law regulating the decision of disputes in India. The book possesses high authority, not only in this country, but under the name of *Fatawa-i-Hindi*, it is regarded in other Muhammadan countries, like Turkey, Egypt, and Arabia itself, as an authoritative work of Muhammadan jurisprudence. This great work summarizes the state of Muhammadan Law regarding missing persons in the following terms:—"A missing person is declared dead on the lapse of ninety years, and this is the accepted opinion. And in the *Zahirur Riwayat* the term is to be estimated by the death of his coevals, and therefore when none of them remains alive he is declared dead, and this is to be determined according to the death of his coevals in his town, as is said in the *Kafi*. The preferable (opinion) is that the question should be delegated to the opinion of the Imam, as is said in the *Tabeen* (2)."

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(1) اختار الشيخ الامام ابوبكر محمد بن حامد انها تسعون سنة لان الغالب فى اعمار اهل زماننا و هذا لا يصح الا ان يقال إن الغالب فى الاعمار الطوال فى اهل زماننا ان لا يزيد على ذلك نعم المتاخرون الذين اختار واستغنين نبوه على الغالب من الاعمار والحاصل ان الاختلاف ما جاء الامن اختلاف الراى فى ان الغالب هذا فى المطول او مطلقا فلا اقال شمس الائمه الاليق بطريق انفقه ان لا يقدر بشئى لا نصب المقادير بالراى لا يكون و هذا قول المصنف الاقبس و لكن نقول إذا لم يبق احد من اقرانه يحكم بموته إعتباراً لحاله بحال نظايره و هذا رجوع الى ظاهر الرواية قال المصنف إلا رفق الى الناس ان يقدر بتسعين و إلا رفق منه التقدير بستين و عندى الاحسن سبعون بقوله عليه الصلواة والسلام أعمار امتى مابين ستعين إلى سبعين فكانت المنتهى غالبا و قال بعضهم يفوض إلى راى القاضى فاى وقت راى المصلحة حكم بموته *

(2) حكم بموته بمضى تسعين سنة و عليه الفتوى و فى ظاهر الرواية يقدر بموت اقرانه فاذا لم يبق احد من اقرانه حيا حكم بموته و يعتبر موت اقرانه فى اهل بلده كذا فى الكافى والمختار انه يفوض الى الراى الامام كذا فى التبيين *

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Now, reading these texts carefully, there can, I think, be no doubt, *firstly*, that the rule of the Muhammadan Law as to missing persons has arisen from a maxim relating to the subject of evidence, and the rule of *istis-háb*, which is the outcome of that maxim, cannot be regarded as a rule of succession, inheritance, or marriage; *secondly*, that among the great doctors of the Muhammadan Law itself there is a great difference of opinion as to the exact manner in which the rule of *istis-háb* is to be applied to missing persons; *thirdly*, that as to the period necessary to elapse before the presumption of death can be applied to missing persons, Muhammadan jurists themselves are far from being unanimous; *fourthly*, whilst some of the greatest doctors of the law would leave the fixation of period to the discretion of the Judge in each individual case, others consider the preferable course to be that the matter should be determined by the Imam, that is, by the ruling authority, as distinguished from the Kazi or the Judge presiding in a judicial tribunal. These conclusions are amply borne out by the texts which I have quoted, and they convince me that the rule of Muhammadan Law as to missing persons is a rule belonging purely to the domain of legal presumptions falling under the head of the law of evidence; and, I may say, with due deference, that in my opinion the reported cases which have been cited and which tend to support a contrary opinion are not based upon a sound view of the Muhammadan Law. It is true that, in some of the most celebrated treatises of that law, the rule has been discussed as if it were a part of the law of inheritance and succession; but, on the other hand, the *Hedaya* itself and some other equally authoritative treatises have dealt with the subject in a perfectly separate chapter, obviously because the authors regarded it as too general to be classed under any particular head, applying, as it does, to all the branches of law in which the death of a missing person may happen to be the subject of investigation. I think that in administering a medieval system of law it is supremely important that the Courts of Justice in British India should draw a clear distinction between the rules of substantive law and those which belong purely to the province of procedure, because, whilst under s. 24 of the Civil Courts Act the Courts are bound to administer the former branch of the law according to native laws in cases of succession,

inheritance, and marriage, questions which go to the remedy, *ad litis ordinationem*, must be decided according to the general law of British India. The rule as to missing persons appears to my mind to be purely a rule of evidential presumption, and though before the passing of the Evidence Act there might have been perhaps some justification for the Courts to apply the rule to cases of Muhammadan succession, inheritance, and marriage, the provisions of cl. (1), s. 2 of the Evidence Act leave no doubt in my mind that we are now bound, in connection with all questions of evidence, to administer the rules contained in that Act, and it follows that the present case is governed by s. 108 of the Statute.

This view, considering the exigencies of the present case, renders it unnecessary for me to deal with the second question which has been referred to us by the Division Bench. My answer to the first question referred to us must therefore be in the affirmative; and I wish to add that I have dwelt at such length upon the original authorities of Muhammadan Law because they have never been translated into English, and also because if the Muhammadan jurists themselves had regarded the question as belonging to the substantive law of succession, inheritance or marriage, I should have, sitting here as a Muhammadan Judge, felt myself bound by the provisions of the Civil Courts Act to adhere to the view adopted in the cases to be found in the reports.

DUTHOIT, J.—I have nothing to add, except that it appears to me that the rule of Muhammadan Law as to missing persons is clearly not a rule of succession, inheritance, marriage or caste, or any religious usage or institution. The matter is therefore governed by the ordinary statute law of the country, which on the point before us is contained in s. 108 of the Evidence Act.

OLDFIELD and BRODHURST, JJ., concurred.

PETHERAM, C. J.—The question referred to the Full Bench in this case is—"Does the rule contained in s. 108 of the Evidence Act govern the case of a Muhammadan who has been missing for more than seven years, in cases to which, under the provisions of s. 24 of the Civil Courts Act, the Muhammadan Law is applicable?" The answer really depends on the question whether the mode in which the death of the missing person is to be proved,

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is part of the Muhammadan Law of "succession or inheritance." By s. 24 of the Civil Courts Act, persons of the Muhammadan and the Hindu religions respectively are given the right of being governed in the matters therein referred to by their own law, but any other questions in which they are concerned are to be dealt with under the general law of the country. Now, questions of succession and inheritance are questions as to the manner in which property shall devolve or shall be distributed upon the death of the owner either with or without a will. I do not think that they are anything more. Then comes s. 108 of the Evidence Act, which provides that "when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it." Now, if a man's death has been properly proved, his estate will be divided according to the law of the community to which he belongs. But the first thing to be settled is the fact of his death, and only after that has been proved can questions of inheritance arise. The rule of Muhammadan Law in regard to missing persons dates from ancient times and from social conditions to which it may well have been adapted. But to apply it to the totally different conditions of the present day, when the means of communication between distant places have been so extended and improved, and when no man can hide his existence from others in the manner which was formerly possible, and to presume that a man was living ninety years from the date of his birth, though his death was practically certain, would be a piece of gross injustice. It was to benefit the people of this country by enabling proof to be given of facts which should be known, that s. 108 of the Evidence Act was passed. For these reasons, my answer to the question referred to us is in the affirmative.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

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KANDHIYA LAL (PLAINTIFF) *v.* CHANDAR AND OTHERS (DEFENDANTS).*

Bond—Debt—Inheritance—Hindu Law—Right of one of several heirs to sue creditor for share of debt—Contract—Obligation—Act XXVII of 1860—*Act IX of* 1872 (*Contract Act*), *ss.* 42, 45.

Held by the Full Bench (MAHMOOD, J., dissenting) that when, upon the death of the obligee of a money-bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond.

THIS was a reference to the Full Bench by Mahmood and Duthoit, JJ. The facts of the case appear from, and the point of law referred is stated in, the order of reference, which was as follows:—

MAHMOOD, J.—This is an application for revision under s. 622 of the Civil Procedure Code, and the argument addressed to us in support of the application raises a question of considerable importance.

The bond of the 19th October, 1877, was executed by the principal defendants in favour of one Shambhu Singh, upon whose death a 4½ annas share in the bond devolved by inheritance upon his two nephews, Gudri Singh and Bisnath Singh, who, on the 29th October, 1880, sold their rights and interests to the present plaintiff. The object of the suit was to recover from the obligors the amount due on the bond to the extent of the 4½ annas shares purchased by the plaintiff. The learned Judge of the Small Cause Court, without going into the merits of the case, has dismissed the suit on the preliminary ground that the obligation created by the bond, being single, could be enforced only as a whole, and that the plaintiff has not the option of claiming only his portion of the money due on the bond. In support of this view the learned Judge has cited no authorities, but he has at some length stated his reasons, the most important of which is that "an obligor must not be harassed with more than one suit under a single obligation." The other reasons mentioned by the learned Judge relate principally to the practical inconvenience which might arise if the contrary view were adopted.

* Application No. 116 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of Babu Kashi Nath Biswas, Judge of the Court of Small Causes at Benares, dated the 8th February, 1884.

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We have not been referred to any specific provisions, either in the Contract Act or in the Civil Procedure Code, which would furnish a satisfactory answer to the question raised in this case; and, in the absence of statutory provisions, the determination of the question must depend upon the general principles of law and equity. The view adopted by the learned Judge of the Small Cause Court seems to proceed upon the ground that the specific shares in the bond which, upon the death of the original obligee, Shambhu Singh, devolved by inheritance on his various heirs, must be regarded as constituting only one joint right which could not be enforced in parts, by separate suits at the instance of each heir, because the obligation correlative to the right continued to be single, notwithstanding the death of the original obligee. This view of the law is directly opposed to the opinion adopted by three learned Judges of the Calcutta Sadr Diwani Adalat in *Mahant Muddusudun Das* v. *Goverdhun Das* (1), in which it was held that if the right to receive a debt secured by bond devolved by inheritance upon more than one person, the heirs might bring separate actions to recover the proportion that each was entitled to. Similarly, in the case of *Shiu Din Misr* v. *Genda Debi* (2) it was held that, after the dissolution of a partnership, wherein the share of each partner had been ascertained, the sharers could sue separately for their shares of the debts due to the firm. These rulings are old, but we have not been referred to any more recent case in which the point has been directly discussed. The question, which seems to involve mixed considerations of procedure and substantive law, does not appear to us to be free from difficulty as the law stands in India, and, in view of the importance of the point, we refer it to the Full Bench:—

"When, upon the death of the obligee of a money-bond, the right to realize the money has devolved by inheritance in specific shares upon his heirs, can each of such heirs maintain a separate suit for recovery of his share of the money due on the bond?"

Pandit *Sundar Lal*, for the plaintiff.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the defendants.

(1) S. D. A. Rep., 1847, p. 392. (2) S. D. A. Rep., L. P., vol. viii, p. 829.

The following judgments were delivered by the Full Bench:—

OLDFIELD, J.—The answer to this reference seems to me afforded by the terms of Act XXVII of 1860. By that Act "no debtor of any person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on production of a certificate, to be obtained in the manner hereinafter mentioned, or a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled."

The Act indicates the course to be taken by the heirs, and the debts should be collected by the administrator, and the assets distributed amongst the heirs.

The Court can permit an action to be brought by the heirs under the discretion allowed, but it can only properly do so when the party or parties suing are in a position to sue for the whole debt, for to permit one heir to realize his share would be to alter the nature of the contract, and to subject the debtor to inconveniences and hardships.

I would answer the reference in the negative.

PETHERAM, C. J., and BRODHURST, J., concurred.

DUTHOIT, J.—I am of the same opinion as the learned Chief Justice and my learned brothers Oldfield and Brodhurst, but I wish to add a few words by way of explanation as to the way in which I have arrived at the conclusion stated.

There can, I think, be no doubt that when an obligation is contracted between *A* and *B*, then, in default of anything in the nature of the obligation, or of a special covenant to the contrary, the obligation passes to the representatives of the parties. How, then, does the obligation pass? European Jurisprudence would, I believe, say that, if the obligation is indivisible, it cannot be split up among the representatives according to their shares in the inheritance; but, if it be divisible, it can. This was, I take it, the Roman Law on the subject, and it is so stated to have been by Demangeat, who is perhaps the best authority on the point. The French Law, too, is formulated to the same effect in the Civil Code, Book III, Title III, Section V, paras. 1217 to 1221. But

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it would, in my judgment, lead to much inconvenience if we were to attempt to apply this canon in its entirety to the circumstances of this country, where the law of inheritance among Hindus and Muhammadans is complicated by variations, of which, as governing the particular case, one of the parties to the obligation might well have no knowledge.

Take, for instance, the case of a Hindu creditor on whose death the widow enters into possession and management of the estate, and thus obtains payment of a debt due to her husband. Presently three brothers of the deceased come forward and say,—and the fact is admitted by the widow,—that the creditor was living jointly with them, and that consequently the widow had no share in the debt. Or take again the case of a Muhammadan creditor who leaves a widow and ten sons and daughters. The sons and daughters claim, and are paid, their legal shares of the debt, but afterwards the widow comes forward and claims the entire debt, as due to her alone, on account of her dower, a first charge on the estate.

It was, I take it, to meet such difficulties that Act XXVII of 1860 was enacted, the preamble of which recites that it is expedient to consolidate certain Acts, and to remove all doubts as to the legal title to demand and receive debts payable in respect of the estates of deceased Hindus and Muhammadans. The Act then goes on to provide that no debtor of a deceased person shall be compelled to pay his debt to any person claiming to be entitled to any part of the effects of the deceased, except on the production of a certificate obtained under the Act, and that such certificate shall afford full indemnity to all debtors paying their debts to the person in whose favour the certificate has been granted.

The only cases which were quoted to us as answering this reference in the affirmative were decisions of the Court of Sadr Diwani Adalat of the Lower Provinces in *Mahant Muddusudun Das* v. *Goverdhun Das* (1) and in *Shiu Din Misr* v. *Genda Debi* (2). The facts of the latter case are so different from those of the case now before us, that I do not think it can be held to throw light upon the point under discussion; and both the cases are of a date (1847) long prior to

(1) S. D. A. Rep, 1847, p. 392. (2) S. D. A. Rep., L. P., vol. vii, p. 829.

the enactment of Act XXVII of 1860. Under that Act the Calcutta High Court has held—*Waselun Huq* v. *Gowhuroonissa Bibi* (1) and *Srimati Amir-un-nissa Barkat* v. *Srimati Afiatt-un-nissa* (2)—that certificates to collect fractional parts of debts due to a deceased person cannot be granted to different heirs according to their respective shares in the inheritance. And this I take to be a very necessary rule, for we may not consider the convenience of one party to the obligation alone. We are bound to see that the debtors are not unduly harassed by representatives of a deceased creditor. If it be objected that unless a certificate be allowed for a share to the party entitled to such a share, it will be impossible for him, in case of difference between himself and his coparceners, to proceed at all, I would reply, in the words of Mr. Justice Markby in *Srimati Amirunnissa Barkat's Case* (3) "that if a shareholder could not, having established his right to a share, prevail upon his co-shareholders to consent to one certificate being granted, it would be within the competence of the Court, under Act XXVII of 1860, to select one or more of these co-sharers who would consent to act, and appoint him or them as the representatives of the deceased, taking, of course, proper security for the safe custody of the amount of debts that might be realized; and that even if this could not be done, and if there should be any difficulty in appointing one or more of the co-sharers," there would be no difficulty in taking steps to have a receiver appointed under s. 503 of the Code of Civil Procedure.

My answer to the question put to the Full Bench must therefore be in the negative.

MAHMOOD, J.—I regret that in this case I am unable to agree with the learned Chief Justice and the other members of the Court upon the question which has been referred to the Full Bench. It is due to the respect which I feel for my learned brethren that I should state the grounds upon which my own opinion is based at greater length than I should otherwise have considered necessary. The order of reference sets forth all the essential points of the case except one, namely, that the plaintiff, having fallen out with the heirs of the deceased Shambhu Singh, had to bring a regular suit to establish his right to a 4½ annas share in the bond which had

(1) 10 W. R., 105. (2) 3 B L. R. 404.
(3) 3 B. L. R., 404.

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been executed in Shambhu Singh's favour. His claim was decreed on the 20th March, 1883; and the question which we now have to determine is, whether he is competent to maintain a separate suit for the recovery of his share of the money due on the bond, or whether the obligation which the bond creates can only be enforced as a whole.

It appears to me that the opinions expressed by my learned brothers Oldfield and Duthoit proceed, if with all deference I may say so, merely upon the construction which they place upon a particular section of Act XXVII of 1860. The object of that Act is best shown by the preamble, which runs thus :—" Whereas it is expedient to consolidate and amend certain Acts now in force, which provide greater security for persons paying to the representatives of deceased Hindus, Muhammadans, and others not usually designated as British subjects, debts which are payable in respect of the estates of such deceased persons, and which facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same ; it is enacted as follows." Now, I confess that I am unable to hold that the language here used by the Legislature was designed to interfere in the smallest degree with the native laws which regulate the devolution of debts due to a deceased person. It relates not to substantive law, but to procedure, and aims at giving facilities for the removal of doubts and difficulties in the way of creditors and debtors. This brings me to the second point which I desire to notice. S. 2 of Act XXVII of 1860 is as follows :—" No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate to be obtained in manner hereinafter mentioned, or of a probate or letters of administration,"—and then come these important words—" unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled." Now, in the first place, I wish to say, as one of the Judges who have referred this case to the Full Bench, that the reasons which often make it desirable to apply the imperative part of s. 2 do not exist here. The record shows that

in the present case payment of the debt was withheld, not on the ground of reasonable doubt as to the person entitled to receive it, but upon an extremely technical plea; and we have to consider whether such a plea is warranted by the law or not. We are not concerned in Full Bench with the question whether payment was or was not withheld from vexatious motives. That is a question as to the merits of the case, and it is not for us, but for the Divisional Bench, to decide. It was not tried by the Subordinate Judge, and his judgment does not refer to it in any way. I therefore put Act XXVII of 1860 aside altogether in considering the present reference.

The question before us is a complicated and difficult one, involving closely connected considerations of substantive law and of procedure. I propose to deal first with that part of it which relates to the rights of the parties which are created by the substantive law; and secondly, with the procedure to be followed for the enforcement of those rights.

Upon the first point, I have no doubt that the facts as proved and admitted show that the plaintiff represents two of the nephews of Shambhu Singh: in other words, that he can claim all the rights which devolved upon those two nephews in the bond now in dispute. We have to consider whether, according to the Hindu Law, which undoubtedly applies to the case, the rights in the bond inherited by the nephews were joint or several. Under the Hindu Law, as I understand it, where a person dies leaving property, the devolution of rights in that property proceeds, so far as the present question is concerned, in the same manner, whether it consists of land or a bond, or anything else. I have no doubt that in a divided Hindu family the rights which a deceased creditor's heirs inherit are not joint but several, and that just as no one of them could maintain a suit for ejectment from a greater share of a zamindari village land than he himself had separately inherited, so also no single heir could sue for the recovery of more than his own share of the money due upon a bond.

It seems to me that the learned Judge's view proceeds upon the assumption that the specific shares in the bond which devolved by inheritance upon the various heirs of Shambhu Singh must be

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treated as one joint right which could not be enforced in parts by separate suits at the instance of each heir; because the obligation correlative to the right continued to be single notwithstanding the death of the original obligee. Viewed in this light, the question belongs to the domain of substantive law, and not to that of procedure or adjective law. If the rights possessed by the various heirs of Shambhu Singh are to be regarded as constituting one joint right, it may be taken that it could not be enforced except as a whole. "Where the subject-matter of the contract is entire, as if it be to pay a whole sum to several parties, it is solely joint, and no one can bring a separate action for his share. Nor will the mere fact that the share of each is stated, give a separate right of action, if the intention be to pay only one sum *in solido* . . . . . So, also, where different sums of money are contributed by several persons, and the amount raised is advanced as one total sum, it has been held the action for repayment should be jointly brought."—(*Story on Contracts*, s. 55). The reason of the rule is based upon fundamental principles of jurisprudence, regulating the nature and incidents of joint rights and joint obligations. The true notion of joint rights and joint obligations is fully applicable only to cases where any one of several persons entitled to a joint right can require performance to himself of the entire obligation correlative to the right, and where any one of the several persons under a joint obligation can be required to render full performance of the entire obligation. "If the right of the several persons thus entitled, or the duty of the several persons thus obliged is identical, and if the right or duty arises from a simultaneously combined expression of will, such persons are termed *correi*; those thus obliged being *correi debendi*, and those thus entitled being *correi credendi*."—(*Lindley on Jurisprudence*, s. 117 A). When such a full correal relation exists, a joint creditor, by accepting full performance of the obligation, may extinguish it *in toto*, and entirely discharge the debtor. The reason of the rule is, that when money is jointly advanced by several persons, each of them authorises the other by necessary implication to act on his behalf. The question then in the present case is, whether the heirs of Shambhu Singh possessed any such joint right as would entitle each and every one of them to enforce performance to himself of the entire

obligation created by the bond which they had inherited. In other words, could the plaintiff, who represents the interests of two of the nephews of the deceased creditor, maintain a suit for the whole amount due on the bond? I am of opinion that he could not, because the rights inherited by the heirs of the creditor cannot be regarded as correal or joint in their nature. "Parties are not said to be joint in law, merely because they are connected together in some obligation, or some interest which is common to them both. They must be so connected as to be in some measure identified. They have not several and respective shares, which, being united, make a whole; but these together constitute one whole, which, whether it be an interest or an obligation, belongs to all. Hence arises an implied authority to act for each other, which is in some cases carried very far. Thus, if several plaintiffs sue for a joint demand, and the defendant pleads in bar an accord and satisfaction with one of the plaintiffs, but without any allegation that the other plaintiffs had authorized the accord and satisfaction, the plea is nevertheless good. For a release of a debt, or of a claim to damages, by one of many who hold this debt, or claim jointly, is a full discharge of it"—(*Parsons on Contracts*, vol. I, p. 21). The rule thus stated seems to me to be the test for decision of the point raised in this case. For it seems clear that if the plaintiff is not entitled to sue for the whole amount due on the bond, his only remedy is to sue for his own share. The other sharers in the bond may, as has actually happened in this case, be unwilling to join in the suit, and, if the view of the learned Judge were sound law, the plaintiff, who undoubtedly possesses a right, would be without a remedy.

We have in India an enactment dealing with the law of contracts. It can hardly be called a complete Code, but it may be taken as a kind of summary of the main principles which govern contracts. The only sections of the Contract Act which I need refer to are ss. 42 and 45. The former deals with the devolution of joint liabilities, but not with the devolution of joint rights. The latter does relate to joint rights, and it runs thus :—"When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during

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their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly." I have read the section at length in order to show that it does not meet the present difficulty, for it deals only with cases in which the deceased himself is a joint obligee. And there is nothing in the Contract Act to show what happens to a *single* right when the owner of it dies, and several persons become entitled to it. It appears to me that, under such circumstances, the only rule which we have to guide us is the rule of justice, equity, and good conscience, and in applying it we must go back to those first principles of jurisprudence which are deeper and wider than any purely local laws. In connection with the matter before us, those principles have been so well stated by the eminent jurist Domat, that I cannot do better than read a passage from his work on *Civil Law*, which exactly expresses my own view:—"The solidity among several creditors hath not this effect, that every one of them may appropriate the whole debt to himself, and deprive the others of their shares; but it consists only in this, that every one of them has a right to demand and receive the whole, and the debtor remains quiet, with respect to them all, by paying the debt to any one of them. This solidity depends on the title which may give it, and on that which may show that what is owing to several persons is due to every one of them in the whole. Thus, when two persons lend a sum of money, or sell a house or land, they may treat in such a manner as that the payment may be made to any one of the two singly; and they will be creditors, each of them for the whole, either of the money lent, or of the price of the sale. But if it were only said that a debtor should owe a sum of money to two creditors, without mentioning anything of the solidity, in that case each creditor could demand no more than his own portion" (Part I, Book III, Title III, Section II, arts. 1, 2).

This explains the meaning of the term "solidity" in connection with obligations of this nature, and shows that there is no solidity unless any one of the creditors is competent to obtain recovery of the whole debt. There is another passage in the same work, which is even more instructive:—"If a thing is due to two

or more creditors solidly, that is, in such a manner that every one of them has full and ample right to receive the whole, the payment that is made to one of them will discharge the debtor from all the others." And then the author states the very question now before us :—"If there be no solidity among several creditors for one and the same thing, that is, if each of them has not a right to receive the whole thing, but only his portion of it, such as *co-heirs*, none of them can receive the whole for the others, unless they all consent to it"—(Part I, Book IV, Title I, Section III, arts. 7, 8).

In this case, all the co-heirs do not consent that one should receive payment of the whole for the others, and the plaintiff brought the suit in this form for that very reason. To my mind the authority of Domat seems sufficient; but the question is so important that I may refer to the opinion of a still greater jurist, namely Pothier, who, in his Treatise on Obligations, gives a separate chapter to this subject. The chapter is headed "Of the effect of the indivisibility of obligations *in dando aut in faciendo* with respect to the heirs of the creditor." It begins thus :—

"When the obligation is indivisible, each heir of the creditor being creditor of the whole thing, it follows that each of the heirs may demand the whole thing from the debtor. For instance, if any one has engaged in my favour to grant, or procure me for the use of my estate, a right of passage over his or over any other neighbouring estate, this right being indivisible, each of my heirs may institute a demand for the whole against the debtor. So if any one engages to make me a picture, or to build me a house, each of my heirs may demand of him to make the whole picture, and to build the whole house. But each of my heirs, although creditor of the whole thing, is not creditor *totaliter*; if, upon the demand of the whole by one of my heirs, the debtor, for want of executing his obligation, is condemned in damages, the condemnation in favour of this heir will only extend to that proportion of the damages for which he is heir; for although creditor of the whole, he is nevertheless only creditor as my heir for part; if he has a right to demand the whole thing, it is because the thing cannot be demanded in parts, not being susceptible of them; but the obligation of this indivisible thing being converted by the non-execution of it into an obligation of damages, which is divisible, my

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heir in part can claim no greater share of the damages than the part for which he is heir. In this respect, the heirs of the creditor of an indivisible debt differ from the creditors *in solido*, who are called *correi credendi*, each of the latter being creditors not only of the whole thing due, but also *totaliter*; if, upon the demand of the creditor, the debtor does not fulfil his obligation, he must be condemned to the creditor for the whole damages.

"From this principle, that the heir in part of an indivisible debt, though creditor of the whole thing, is not so *totaliter*, it follows also that he cannot make an entire release of the debt which a creditor *in solido* might. Therefore, if the creditor of an indivisible debt has left two heirs, and one of them has made a release to the debtor so far as concerns himself, the debtor will not be liberated as against the other."—Pothier's *Law of Contracts*, Vol. I, p. 197-8).

The jurisprudential conceptions upon which this passage proceeds appear to me to go to the root of the matter, and to show that although a particular right of the kind we are now considering may originally be single, the death of its owner may split it up, and make it enforceable by each of his heirs to the extent of his share, because they are not *correi credendi*, but hold severally. Lastly, to quote one of the more modern writers on jurisprudence, I may translate the following observations in Demolombe's *Traité des Contrats*:—"This right which belongs to the creditor *solidaire*, does it belong in the same way to the heir of the creditor *solidaire*? Certainly. Yes, because it relates to an irrevocable mandate, which is not extinguished by death. Let us always observe that if the deceased creditor has left several heirs, each of them can only demand from the debtor the share which falls to him, in consequence of his position as an heir in the credit *solidaire*. It is true the credit *solidaire* itself belongs to the succession. But the succession being divided among the heirs, with regard to their hereditary position, it follows that the credit *solidaire* necessarily undergoes the same division. The obligation *solidaire* is not, for the matter of that, indivisible"—(Vol. III, p. 117).

In other words, notwithstanding the fact that the right is, in the first instance, a "solid" one, the owner's death makes it no longer subject to the rules relating to rights *in solido*.

Applying these principles to the present case, I am of opinion that, upon the death of Shambhu Singh, although the obligation created by the bond continued to be single, the right correlative to that obligation was split up into the various shares which were inherited by the heirs of the creditor, and that the interests of each of them being limited to the extent of his share, cannot be regarded as constituting a joint right such as would render a separate action like the present unmaintainable. Such seems to have been the view of the law taken by three learned Judges of the Calcutta Sadr Diwani Adalat in *Mahant Muddusuddun Das* v. *Goverdhun Das* (1), in which it was held that if the right to receive a debt secured by bond devolve by inheritance upon more than one person, the heirs may bring separate actions to recover the proportion that each is entitled to. Similarly, in the case of *Shiu Din Misr* v. *Genda Debi* (2) it was held that after the dissolution of a partnership, wherein the share of each partner had been ascertained, the sharers could sue separately for their shares of the debts due to the firm. These rulings are old, but the point does not appear to have been considered in any recent case, so far as I am aware. The former of these rulings, however, is exactly applicable to the present case, and for the reasons which I have already stated, I agree in the rule therein laid down. It has been said by my learned brother Duthoit, that the latter of the two rulings to which I have referred has no bearing upon the question now under consideration, and whilst interpreting the rules of jurisprudence as understood in Europe in the same manner as I have done, he has expressed the view that those rules would lead to much inconvenience if applied to the peculiar conditions of Indian life. With due deference to his opinion, I regret that I am unable to agree with him in either of these propositions. The case of *Shiu Din Misr* v. *Genda Debi* (2) to which he refers appears to me to proceed upon the same hypothesis as the other case, for in both cases a single right was held by the learned Judges to have been split up into several rights,—in the one case by reason of the death of the creditor, in the other by the dissolution of partnership. The *ratio decidendi* in both cases purported to proceed upon the same principle, and I have therefore cited them, though I must not be understood to say that the effect

(1) S. D. A. Rep., 1847, p. 392. (2) S. D. A. Rep., L. P., vol. vii, p. 829.

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of dissolution of partnership is the same as that of the death of a creditor upon rights and obligations arising out of money-bonds. If anything the case of *Shiu Din Misr* (1) goes beyond my view, and it is unnecessary for me to express any opinion upon the rule therein laid down. As to the advisability of applying the rules of jurisprudence to this country, I have long entertained the opinion that jurisprudence, being a science, is and must be applicable to all conditions of life where society has sufficiently advanced to render the introduction of the rules of law necessary for defining rights and deciding disputes; and I cannot help feeling that the complications which the Hindu and the Muhammadan Law of inheritance produce in connection with the devolution of rights are not greater than those produced by the laws of Europe, where the principles of jurisprudence are of course kept in view in administering justice.

So far as the opinion of the learned Judge of the Small Cause Court is concerned with the question of procedure, I wish to observe that the practical inconvenience which he anticipates would apply equally to a case where the owner of immoveable property dies leaving numerous heirs whilst the property is in the possession of a trespasser. It is clear that so long as the original owner was alive, he could claim possession of the whole property only by one suit, and it is equally clear that upon his death each of the heirs could maintain a separate action for his share of the property. Although the case so contemplated would be one arising out of tort and not out of contract, yet so far as the limited question of procedure is concerned, the analogy seems very strong with the point now under consideration. In both cases the right to sue could, under the rules of procedure, be at one time enforced as a whole, in both cases the death of the holder of the right may split up the right and render it enforceable by every one of the heirs by separate actions co-extensive with their shares in the inheritance, and, if the argument of the learned Judge of the Small Cause Court were to be accepted in the case contemplated, no heir could sue the trespasser at all unless he sued not only for his own share, but also for the shares of the other heirs who may be unwilling to join in the suit. There is no provision in our law by which any person can be made a plaintiff against his will. Where the right is strictly

(1) S D. A. Rep., L. P., vol vii, p. 829.

joint, there arises, as I have already said, an implied authority by the joint holders of the right to act for each other, and such authority would enable any one or more holders of the joint right to maintain a suit in their own name for enforcing the whole right, and in case any of them refused to join in the suit, the proper course would be to implead them as *pro formâ* defendants, and the Court having before it all persons interested in the matter could do justice between them. But no such implied authority can be understood to exist between the various heirs of a deceased person who dies leaving property which devolves in specific shares upon his heirs, whether such property consists of a money-bond or land. Any one of such heirs therefore cannot sue for more than his share, and the plaintiff was therefore entitled to maintain this suit. The other shareholders in the bond whom the plaintiff impleaded as *pro formâ* defendants might have joined in the suit as plaintiffs under the provisions of s. 26 of the Civil Procedure Code, but that section cannot be understood to render such joinder imperative, and indeed in cases where dissensions exist among the heirs, such joinder is practically impossible. In the present case, therefore, the plaintiff could not sue for more than his share in the bond, and I hold that the learned Judge was wrong in law in throwing out the suit on the preliminary ground.

My answer to the question is therefore in the affirmative.

APPELLATE CIVIL.

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January 7.

Before Mr. Justice Brodhurst and Mr. Justice Duthoit.

ZAHUR KHAN AND ANOTHER (JUDGMENT DEBTORS) *v.* BAKHTAWAR AND OTHERS (DECREE-HOLDERS). *

Execution of decree—Decree payable by instalments—Execution of whole decree—Construction of decree—Payments out of Court—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (6)—Civil Procedure Code, s. 258—Limitation.

A decree passed against the defendant in a suit, and dated the 13th March, 1877, directed "that the plaintiff should recover the decree-money by instalments, agreeably to the terms of the deed of compromise, and he, in case of default, should recover in a lump sum." The compromise mentioned in the decree pro-

* Second Appeal No. 59 of 1884, from an order of H. D. Willock, Esq., District Judge of Azamgarh, dated the 16th February, 1884, affirming an order of Babu Madho Lal, Officiating Subordinate Judge of Azamgarh, dated the 17th January, 1884.

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vided that the amount in dispute should be paid in ten instalments, from 1284 to 1294 fasli, the first to be paid on the 27th May, 1877 (1284 fasli), and the remaining nine instalments on Jaith Puranmashi of each succeeding fasli year. On the 1st September, 1883, the decree-holders applied for execution of the decree, alleging that the first four instalments had been paid, but not any of the succeeding instalments, and they claimed to recover, under the terms of the decree, the fifth and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation, as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that, even if the first four instalments had been paid, such payments could not be recognised by the Court as they had not been certified.

Held, reversing the decision of the lower appellate Court, that if the four annual instalments had not been paid under the decree, the execution of the decree was barred by limitation.

Held also, that recognition of such instalments was not barred by the terms of s. 258 of the Civil Procedure Code *Sham Lal* v. *Kanahia Lal* (1) and *Fakir Chand Bose* v. *Madan Mohan Ghose* (2) followed.

THE decree of which execution was sought in this case was in these terms :—"That a decree be passed against the defendant in favour of the plaintiff for Rs. 3,327-7-0, being the amount sued for, with costs and interest during the pendency of the suit, together with interest at the rate of ten annas per cent. from this day, by establishment and enforcement of lien against the hypothecated property; that the plaintiff should recover the decree-money by instalments, agreeably to the terms of the deed of compromise, and in case of default he should recover in a lump sum."

The compromise mentioned in this decree provided that the Rs. 3,327-7-0 should be paid in ten instalments, from 1284 to 1294 fasli, the first, Rs. 327-7-0 in amount, to be paid on the 27th May, 1877 (1284 fasli), and the remaining nine instalments, Rs. 300 each, to be paid on Jaith Puranmashi of each succeeding fasli year. The decree was dated the 13th March, 1877. On the 1st September, 1883, the decree-holders applied for execution of the decree. They alleged that the first four instalments had been paid, but not any of the succeeding instalments, and they claimed to recover, under the terms of the decree, the 5th and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation, as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that if even the first four instalments

(1) I. L. R., 4 All., 316. (2) 4 B. L. R., 130.

had been paid, such payments could not be recognised by the Court, as they had not been certified The Court of first instance (Subordinate Judge of Azamgarh) held that it was immaterial whether the decree-holders had or had not received the first four instalments, as the application had been made within three years from Jaith Puranmashi 1288 fasli (12th June, 1881), the date the 5th instalment fell due. On appeal by the judgment-debtors, the lower appellate Court (District Judge of Azamgarh) affirmed the order of the first Court.

It observed :—"The appeal fails. All the rulings that have been given on the subject of such limitations are in favour of the decree-holders' case. Art. 179, sch. ii, Act XV of 1877, corresponds with art. 167 of the second schedule of Act IX of 1871, and the rulings of the Allahabad Court (*Kanchan Singh* v. *Sheo Prasad*, I. L. R., 2 All. 291) and of the Calcutta Court (*Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (I L. R., 9 Calc. 857) are one, that is, to the effect that in such cases it is immaterial whether former instalments were paid or not; that applications made within three years from the date on which any instalment claimed fell due are within time; that the clause in a decree empowering a decree-holder to execute the decree for the whole amount due on the default of any instalment was made solely for his benefit and protection, and did not contract any of the privileges otherwise granted."

The judgment-debtors appealed to the High Court on the grounds that the period of limitation for the application for execution should be computed from the date of the first default, and that the cases cited by the lower appellate Court were not applicable to the present case, because in the present case the payment of the instalments was denied. It was also contended that the disputed payments, even if made, could not be recognised, as they had not been certified.

Pandit *Ajudhia Nath* and Shah *Asad Ali*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

The Court (BRODHURST and DUTHOIT, JJ.) delivered the following judgment :—

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DUTHOIT, J.—We do not agree with the lower appellate Court that it is immaterial whether four annual instalments had or had not been paid under the decree, for we consider that if they were not paid, the execution of the decree was time-barred. We are unable, however, to accept the contention of the learned pleader for the appellants, that cognizance of payment of such instalments is barred by the terms of s. 258 of the Civil Procedure Code. This contention is opposed to the ruling of a Division Bench of this Court in *Sham Lal* v. *Kanahia Lal* (1) which followed and approved a Full Bench decision of the Calcutta Court—*Fakir Chand Bose* v. *Madan Mohan Ghose* (2).

We reverse the decision of the lower appellate Court upon the preliminary point noted above, and remand the case for disposal on the merits, after ascertainment of the fact whether the four instalments were or were not paid under the decree as asserted by the decree-holders and denied by the judgment-debtors. The costs of this appeal will abide the final result.

Appeal allowed.

Before Mr. Justice Brodhurst and Mr. Justice Duthoit.

1885 *January 7.*

RAM LAL (DECREE-HOLDER) *v.* RADHEY LAL AND ANOTHER (JUDGMENT-DEBTORS). *

Execution of decree—Powers of Court in executing transmitted decree—Civil Procedure Code, ss. 228, 239.

The powers which the foreign Court has, under s. 228 of the Civil Procedure Code, are confined to the execution of the decree, and the Court cannot question the propriety or correctness of the order directing execution, nor can it, with reference to s. 239 of the Code, stay execution except temporarily.

Held, therefore, where the drawers of a hundi, against whom the indorsee from the payee had obtained a decree on the hundi, objected in the Court to which the decree had been transmitted for execution that execution should not be allowed, because the payee had paid the amount of the hundi to the decree-holder, after the decree had been passed, and such Court refused to entertain the objection, that the order of the lower appellate Court directing that the parties should be allowed to produce evidence in regard to the alleged payment, and that, should the Court of first instance find that the decree-holder had received satisfaction to the full amount of the decree, the judgment-debtors should be absolved from all liability under the decree, could not be maintained.

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* Second Appeal No 80 of 1884, from an order of A. Sells, Esq., District Judge of Cawnpore, dated the 2nd July, 1884.

(1) I. L. R., 4 All., 316. (2) 4 B. L. R., 130.

THE decree of which execution was sought in this case had been obtained under these circumstances.. A firm carrying on business at Cawnpore drew three hundis on another firm carrying on business at the same place in favour of one Ajudhia Prasad, the proprietor of a firm styled Phundu Lal, Ganga Prasad. The payee either indorsed the hundis to one Ram Lal, or sent them to him for realisation, it did not appear which, and Ram Lal procured the acceptance of the hundis. Subsequently Ram Lal sued the drawers and acceptors on the hundis in the Court of the Civil Judge of Lucknow, and on the 2nd August, 1875, obtained a decree. This decree was transferred for execution to the Subordinate Judge of Cawnpore.

The drawers, judgment-debtors, took the following objection to the execution of the decree :—"That the whole decretal money has been realised by the plaintiff from Ajudhia Prasad (who sold the hundi), after the passing of the decree; the plaintiff is, therefore, not competent to take out execution of the decree." The Subordinate Judge disallowed this objection on the following grounds :—

"The Court, however, observes that the objectors (judgment-debtors) or Suraj Bhan (who accepted the hundis), against whom the decree of the 2nd August, 1875, had been obtained, not having paid any portion of the judgment-debt, they (objectors) have no right to take this objection. If there was any dealing between Ram Lal and Ajudhia Prasad, the Court would not hold such payment to have been made in satisfaction of the decree, because Ajudhia Prasad sold the hundis to Ram Lal, or sent them to him as a commission agent to realise their amount, and Suraj Bhan had accepted the hundis in favour of Ram Lal, and for this reason Ram Lal brought the regular suit in his own name, obtained a decree, and took out its execution. If all the statements made by the objectors be true, then Ajudhia Prasad is the original decree-holder. and Ram Lal is the second decree-holder. The transaction between them is not tantamount to satisfaction of the judgment-debt. When there is a dispute between Ram Lal and Ajudhia Prasad before the Court, all such questions would be decided. The judgment-debtors can by no means take advantage of the transactions between the said persons, and plead that the decree had been satisfied."

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RADHEY LAL.

The judgment-debtors appealed to the District Judge. On the question whether if the amount of the decree had been paid to the decree-holder by Ajudhia Prasad, the proprietor of the firm of Phundu Lal, Ganga Prasad, execution of the decree should be allowed, the District Judge observed as follows:—

"The appellants affirm that in October, 1875 (about two months after the passing of the decree), the respondent adjusted the claim with the firm of Phundu Lal, Ganga Prasad, by debiting that firm with the amount due under the decree, and they contend that, as against themselves, therefore, the respondent now has no claim. It is stated also (but this has not been inquired into) that the firm of Phundu Lal, Ganga Prasad, also show this settlement in their books, and it is further declared that, at the present time, there is no balance (in the accounts between the two firms) to the credit of Phundu Lal, Ganga Prasad, thus showing that the adjustment had been complete. The respondent calls in question the fact of any such adjustment, but at the same time distinctly contends that, even supposing it to have been an actual fact, it could in no way affect his rights against the appellants under the decree. This view I cannot hold to be valid. Decree was given simply on the basis of the hundis, and if any of the intermediate possessors of the hundis, even though not sued jointly with the appellants, chose to pay the respondent the full amount of his decree, even though it had not been passed against themselves, the decree by such payment became virtually satisfied, and it is utterly impossible for me to concur in the view that, if such satisfaction was made, the decree-holder could still recover from the judgment-debtors If this adjustment has actually taken place between respondent and Phundu Lal, Ganga Prasad, the former can have no further claim upon the appellants. Everything turns upon the *bonâ fide* character, the reality of the alleged payment of the amount by Phundu Lal, Ganga Prasad, to the respondent, and I think that the lower Court was in error in not allowing the appellants to establish its reality." After disposing of other questions raised in the case, which it is not material for the purposes of this report to notice, the District Judge made the following order:—"The case will now be returned to the lower Court with directions to allow the parties to produce evidence in regard to the alleged payment to respondent by Phundu Lal, Ganga

Prasad in October, 1875, and should the Court find that satisfaction to the full amount of the decree has been received by the respondent, the appellants should be held absolved from all liability under the decree."

The decree-holder appealed to the High Court, contending that the Courts to which the decree had been sent for execution could not go behind the certificate, and could not entertain the objection of the judgment-debtors.

Pandit *Ajudhia Nath*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondents.

The Court (BRODHURST and DUTHOIT, JJ.) delivered the following judgment:—

DUTHOIT, J.—The order of the lower appellate Court cannot be maintained. The powers which the foreign Court has, under s 228 of the Code of Civil Procedure, are confined to the *execution* of the decree. It cannot question the propriety or correctness of the order directing execution, nor can it (s. 239 of the Code) stay execution except temporarily.

We reverse the order of the lower appellate Court and restore the order of the Court of first instance.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Mahmood.

1885
January 8.

CHHAB NATH (PLAINTIFF) *v* KAMTA PRASAD AND ANOTHER (DEFENDANTS)*.

Bond—Interest—Covenant for rate of interest after due date of bond.

In a deed of mortgage, dated in July, 1870, the mortgagors covenanted, among other things, as follows:—"That, having repaid the principal amount in the course of three years, we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of Re. 1-2 per cent per mensem; that, should we in any year fail to pay the amount of interest, it shall, at the close of the year, be consolidated with the principal amount, and we shall pay compound interest at Re 1-2 per cent per mensem .. ..that, in the event of non-payment of the principal and interest on the expiration of the appointed time, the" mortgagee "shall be at liberty to recover from us the whole amount due to him with interest by means of a law suit."

* First Appeal No 22 of 1884, from a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 25th September, 1883.

1885

CHHAB NATH v. KAMTA PRASAD.

Held that the terms of the bond amounted to a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due; that, the bond containing an express covenant for the payment of interest at that rate, the interest was not affected by the considerations of the reasonableness or otherwise of the rate; and that the mortgagee was therefore entitled to interest up to the date of the decree at the rate of Re. 1-2 per mensem.

Baldeo Panday v *Gokal Rai* (1) referred to.

THE plaintiff in this suit claimed to recover Rs. 15,000, principal and interest, due on a mortgage-bond dated the 28th July, 1870. The defendants were Kamta Prasad, one of the original mortgagors, and the heirs of Bhagwan Din, the other mortgagor, deceased. The material portion of this bond was as follows:—

"We, Kamta Prasad and Bhagwan Din, do declare that, having received Rs. 4,645-5-6 of the current coin (half of which is Rs. 2,322-10-9), from the said Mahajan (Chhab Nath), and brought the money to our own use, we covenant and agree that having repaid the principal amount in the course of three years, we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of one rupee and two annas per cent per mensem; that should we in any year fail to pay the amount of interest, it shall, at the close of the year, be consolidated with the principal amount, and we shall pay compound interest at one rupee and two annas per cent. per mensem; that for the satisfaction of the said Mahajan we have, in lieu of the said amount, hypothecated our respective zamindari rights as detailed below, and until the repayment of the principal amount and interest due to the said Mahajan, we shall not transfer them to any other person by sale or mortgage, &c.; that whatever amount we pay as interest shall be entered on the back of the bond, and we shall not set up payments except on the basis of indorsements on the bond, and if we do so, the claim shall be deemed false; that in the event of non-payment of the principal and interest on the expiration of the appointed time, the said Mahajan shall be at liberty to recover from us the whole amount due to him with interest by means of a law suit."

The mortgagors failed to pay interest as agreed. The interest claimed by the plaintiff, which amounted to Rs. 10,354-10-6, was made up of compound interest for three years from the date of the

(1) I. L. R., 1 All, 603.

bond to the due date, and of simple interest from the latter date to the date of suit, at the rate of Re. 1-2-0 per cent. per mensem.

The defendants set up as a defence to the suit, amongst other things, that the plaintiff had improperly charged compound interest, and that the plaintiff should be allowed interest from the due date of the bond at the rate of eight annas per cent. per mensem only.

The lower Court (Subordinate Judge of Cawnpore) held on the issues framed on this defence, the fourth and fifth, that the plaintiff was entitled to compound interest as claimed, but that he was not entitled to interest after the due date of the bond at the rate of Re. 1-2-0 per cent., but at the rate of eight annas only. It observed as follows :—

"As to the fourth and the fifth issues, the Court is of opinion that, according to the conditions laid down in the deed sued upon, the plaintiff is entitled to get interest on the principal as well as interest on the interest up to the due date ; for compound interest was stipulated, and the deed sued upon contains a provision for the payment thereof. But after the expiry of the date, he shall, of course, get interest on the principal only, and that, too, at the rate of 8 annas per cent. The plaintiff much delayed the institution of the suit, to let a large amount of interest accumulate. The deed in suit was executed on the 28th July, 1870, and the term fixed for the repayment of the debt was three years, which expired on the 28th July, 1873. But the suit was instituted on the 8th September, 1882, or after nine years, one month and 11 days, and the result is that the interest has come to Rs. 10,354-10-6, while the principal is only Rs. 4,645-5-6. The Court does not think it just to allow interest after the due date at the stipulated rate."

The plaintiff appealed to the High Court, and it was contended on his behalf that he was entitled to interest up to the date of the decree at the stipulated rate of Re. 1-2-0 per cent. per mensem, and that the lower Court was not competent to reduce the rate of interest payable after the due date. In support of this contention, the case of *Baldeo Panday* v. *Gokal Rai* (1) was referred to.

Mr. *C. H. Hill* and Shah *Asad Ali*, for the appellant.

(1) I. L. R., 1 All., 603.

1885

CHHAB NATH v. KAMTA PRASAD.

Munshi *Hanuman Prasad* and Lala *Jokhu Lal*, for the respondents.

The Court (PETHERAM, C. J., and MAHMOOD, J.) delivered the following judgments :—

PETHERAM, C.J.—I think that this appeal must be allowed. As I understand the matter, the principal and interest are claimed at Rs. 15,000 by calculating compound interest for a period of three years, and simple interest at Rs. 13-8 per cent. from the end of that period to the date of the institution of the suit. The terms of the bond are rather more wide than I at first supposed, and they appear to me to amount to a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due. The terms of the bond seem to bring it within the case cited by Mr. *Hill*; and, if so, we are bound to follow the decision in that case. But our own view is the same. If the bond contains an express covenant for the payment of interest at this rate, then the interest will not be affected by the considerations of the reasonableness or otherwise of the rate, because the amount was agreed upon by the parties. It is also well within what would have been due to the plaintiff, if he had taken the account strictly on the terms specified in the bond. The appeal must be decreed, and the decree will be for the amount claimed in the plaint with costs.

MAHMOOD, J.—I am of the same opinion.

Appeal allowed.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

MAGNI RAM* AND ANOTHER (DEFENDANTS) *v.* JIWA LAL AND OTHERS (PLAINTIFFS).*

High Court's powers of revision—Civil Procedure Code, s. 622.

In a suit to enforce the right of pre-emption in respect of a usufructuary mortgage of immoveable property, the plaintiffs alleged that the consideration-money was less than that stated in the mortgage deed. The Court of first instance gave the

* Second Appeal No. 1738 of 1884, from a decree of H. G. Pearse, Esq., Offg. District Judge of Mainpuri, dated the 5th September, 1884, affirming a decree of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 11th July, 1884.

plaintiffs a decree for possession of the property, on payment of an amount less than that mentioned in the deed; and this decree was affirmed on appeal. The mortgagees appealed to the High Court on the following grounds :—"(i) Because it was for the respondents to prove that any portion of the consideration was not paid. (ii) Because the lower Court has not considered the evidence of the appellants. (iii) Because the finding of the lower Court is based on conjecture."

Held, on the question whether, such grounds not being grounds on which a second appeal is allowed by Chapter 42 of the Civil Procedure Code, the appeal should not proceed rather under Chapter 46, s. 622 of that Code, that the appeal could not proceed under s. 622 of the Civil Procedure Code in consequence of the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (1) that only questions relating to the jurisdiction of the Court could be entertained under that section.

THIS was a reference to the Full Bench arising out of the following facts. The plaintiffs in the case sued to enforce the right of pre-emption in respect of a usufructuary mortgage of certain immoveable property. They alleged that the consideration-money was less than that stated in the mortgage-deed. The Court of first instance gave the plaintiffs a decree for the possession of the property, on payment of an amount less than that mentioned in the mortgage-deed. On appeal by the mortgagees the appellate Court affirmed this decree. The mortgagees preferred a second appeal to the High Court. The grounds of appeal were as follow :—

"(i) Because it was for the respondents to prove that any portion of the consideration was not paid.

(ii) Because the lower Court has not considered the evidence of the appellants.

(iii) Because the finding of the lower Court is based on conjecture."

The appeal was admitted under s. 551 of the Civil Procedure Code. The appeal came on for hearing before Petheram, C.J., and Duthoit, J. The learned Chief Justice being of opinion that the grounds of appeal were not grounds on which a second appeal is allowed by s. 581 of the Civil Procedure Code, and that therefore the appeal would not lie, and that the appellants should consequently seek their remedy under s. 622, the Bench referred the following question to the Full Bench :—

(1) I. L. R., 11 Calc., 6.

1885

MAGNI RAM v. JIWA LAL.

"Should this appeal proceed under Ch. 42, or under Ch. 46, s. 622?"

Pandit *Ajudhia Nath*, for the appellants.

The following opinion was delivered by the Full Bench:—

PETHERAM, C.J., and OLDFIELD, BRODHURST, MAHMOOD, and DUTHOIT, JJ.—This appeal cannot proceed under s. 622 of the Civil Procedure Code, because the Privy Council has decided in *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (1) that only questions relating to the jurisdiction of the Court can be entertained under that section. The appeal will be laid before a Division Bench for orders under s. 551.

APPELLATE CIVIL.

1885 *January* 12.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

KAULESHAR PANDAY (PLAINTIFF) *v.* GIRDHARI SINGH AND ANOTHER (DEFENDANTS).*

Jurisdiction—Civil and Revenue Courts—Declaration that land is plaintiff's sir and defendant a lessee—Landholder and tenant.

A zamindar claimed a declaration that certain land was his *sir*, and that the defendants were in possession thereof as his lessees. The defendants resisted the claim on the ground that they were tenants of the land at fixed rates, and not lessees of it as the plaintiff's *sir*.

Held that the suit raised the question whether the land was *sir*, in respect of which no occupancy-rights could be created except by contract, and whether the defendants were the plaintiff's lessees, and that this was a question purely of contract, and one which was cognizable in the Civil Courts.

THE plaintiff in this suit, a zamindar, claimed a declaration that certain land was his *sir*, "that the defendants were in possession thereof as cultivators under a lease granted by the plaintiff, and that they should continue in possession of the land by payment of the rent entered in the lease." The defence to the suit was that the defendants were tenants at fixed rates of the land, and not lessees of it, as the plaintiff's *sir*, and that as the relation of landlord and tenant admittedly existed between the parties, and the object of the suit was the determination of the nature of the tenancy, the suit was exclusively cognizable in the Revenue Courts.

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* First Appeal No. 52 of 1884, from a decree of W. Barry, Esq., District Judge of Jaunpur, dated the 11th January, 1884.

(1) I. L. R., 11 Calc. 6.

The judgment of the lower Court (District Judge of Jaunpur) was in these terms :—

"The issue is, whether the suit is cognizable by the Civil Court? I find that the two defendants, Banslochan Singh and Girdhari Singh, are own brothers. The plaintiff asserts that this land is his *sir*, and that he has let it to Banslochan under a lease, and taken a *kabuliyat* from him. Banslochan Singh is in prison, and he does not defend the suit. But his brother, Girdhari Singh, replies that the holding is hereditary, and not the *sir* of plaintiff; that he knows nothing of the alleged lease ; and that the suit is not cognizable by the Civil Court.

"The plaintiff admits that both the defendants are in possession ; the relation of landlord and tenant is thus established; so the dispute resolves itself into a dispute about the nature of the defendants' holding; plaintiff asserts the land is his *sir*, and that defendants hold under a lease, and, of the defendants, Girdhari ignores the lease, and asserts that his family has held the land for generations. It is thus clearly a case for a Revenue Court. The suit is dismissed with costs "

The plaintiff appealed to the High Court, contending that the suit had been properly instituted in the Civil Court.

Munshi *Hanuman Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following judgment:—

PETHERAM, C.J.—We think that the appeal must be allowed. The suit raises the question whether the land to which the suit relates is *sir*-land. This is land in respect of which no occupancy rights can be created except by contract. The plaintiff contends that he granted a lease of the land to the defendants. The question is, whether the land is *sir*-land, and the defendants are the plaintiff's lessees. The question whether the defendants are the plaintiff's lessees is a question purely of contract, and is one which is cognizable in the Civil Courts.

Appeal allowed.

1885
January 14.

Before Sir W. Comer Petheram, Kt , Chief Justice, and Mr Justice Brodhurst.

PHULCHAND AND OTHERS (DEFENDANTS) *v.* MILLER (PLAINTIFF).*

Statute 11 *and* 12 *Vic.*, *c.* 21, *s.* 24—*Insolvent—Voluntary transfer.*

On the 12th March, 1881, a firm, the partners of which were subsequently, within two months from that date, adjudicated insolvents under 11 and 12 Vic. c. 21, suspended payment. On the night of the previous day, the 11th March, one of the creditors of the firm, the impending bankruptcy of the firm having become known, urged the latter to make over a part of their stock-in-trade as security for the debt, and to this the insolvents consented The only pressure which appeared to have been exercised was that, on the 11th March, security was demanded from the insolvents.

Held that there having been no pressure which could not be resisted, and no legal proceedings having existed against the insolvents, or which they could have feared, the transaction was a voluntary transfer, and therefore void under s. 24 of 11 and 12 Vic., c. 21.

THE suit out of which this appeal arose was brought by the plaintiff as the official assignee of the estate of a firm trading at Calcutta and Cawnpore. This firm, which carried on business at Cawnpore under the style of Paramsukh-Sheolal, was adjudicated insolvent on the 26th March, 1881. The defendants in the suit were Gansham Das and Keshab Deo, the proprietors of the firm of Gansham Das-Keshab Deo, Hardat, their gomashta, and Phulchand, the proprietor of the firm of Phulchand-Makhan Lal. It appeared that on the 11th March, 1881, it became known in Cawnpore that the firm of Paramsukh-Sheolal was insolvent. On the night of that day, about 11 p.m., the firm of Paramsukh-Sheolal agreed to deliver a portion of their stock in trade to the agent of the firm of Phulchand-Makhan Lal, in part payment of a debt due by the former firm to the latter. Carts were laden with piece-goods, and were about to leave the premises of Paramsukh-Sheolal, when the gomashta of the firm of Gansham Das-Keshab Deo asked for some of the stock also as security for a hundi held by them, and accepted by the firm of Paramsukh-Sheolal, and in respect of which it was uncertain whether it had been honoured. It was accordingly agreed that the firm of Gansham Das-Keshab Deo should retain the goods, making them over to the firm of Phulchand-Makhan Lal, in the event of the hundi having been honoured. On the following day,

* Second Appeal No 1477 of 1883, from a decree of A Sells, Esq, District Judge of Cawnpore, dated the 31st July, 1883 modifying a decree of Maulvi Fairid-ud-din, Subordinate Judge of Cawnpore, dated the 31st March, 1883.

the 12th March, 1881, the firm of Paramsukh-Sheolal stopped payment. Two or three days later the goods were delivered to the firm of Phulchand-Makhan Lal, the hundi having been honoured.

The plaintiff in this suit claimed to recover from the defendants the goods in question, or their value, and damages for their wrongful detention. The Court of first instance (Subordinate Judge of Cawnpore), for reasons which it is not material for the purposes of this report to state, dismissed the suit The plaintiff appealed to the District Judge, who held that the plaintiff was entitled to recover the goods, as the transfer of them was void under s. 24, c. 21, 11 and 12 Vic. The District Judge observed as follows:—

"Of course the delivery was the result of pressure, but virtually it must still be regarded as being an absolutely voluntary delivery. Now this delivery was certainly made within two months before the bankrupts on petition under c. 21, 11 and 12 Vic., were adjudicated insolvents (26th March, 1881). Accordingly, if made by the bankrupts, when 'in insolvent circumstances,' it becomes void, as against the insolvent's assignee, under s 24 of that statute. Now I imagine that to meet the condition indicated by the term, 'in insolvent circumstances', it is not necessary that a firm should actually have stopped payment and suspended business, but that it is simply required that they should be unable to meet the demands made upon them, and this must unquestionably have been the position of the bankrupts at the time this delivery was made, for it is said to have occurred about 10 or 11 p.m , on the last night of the existence of the business. It took place on the night of the 11th March, and the firm suspended payment on the 12th. It was not a delivery made in the ordinary course of business, but a delivery in part payment to one creditor in preference to the general body; and further, as an actual transfer it dated even after the firm had suspended business. When the goods were handed over to Gansham Das, it was not an out-and-out transfer; they were simply given as security, and the actual delivery to Phulchand-Makhan Lal did not take place till some days after. I am of opinion therefore that the transfer was unquestionably void, and within the meaning of s. 24 of the Insolvency Act even fraudulent."

1885

PHULCHAND MILLER.

The District Judge in the event gave the plaintiff a decree against the firm of Phulchand-Makhan Lal for Rs. 1,198, the value of the goods, and dismissed the suit as against the other defendants.

The defendants against whom the suit was decreed appealed to the High Court.

Munshi *Sukh Ram*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Mr. *E. C. F. Greenway*, for the respondent.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following judgment:—

PETHERAM, C.J.—We think that this appeal must be dismissed. The question is, whether a transaction between certain insolvents, or persons who shortly afterwards were adjudicated insolvents, and one of their creditors, is void. The answer to this question depends on what are the proper inferences to be drawn from the facts. The facts are, that on the 12th March the insolvents suspended payment. On the night of the previous day, the 11th March, the creditor, the impending bankruptcy of the insolvents having become known, urged the latter to make over a part of their stock-in-trade as security for the debt, and to this the insolvents consented. Now, was this a voluntary transfer? because if it were, it is void under s. 24 of 11 and 12 Vic., c. 21. All that appears is, that on the 11th March security was demanded from the insolvents. There was no pressure which could not be resisted. There were no legal proceedings against the insolvents existing, nor could they have feared any, as they must have known that on the following day they would stop payment. Under these circumstances, we are of opinion that the transfer was a voluntary one.

Appeal dismissed.

1885 *January* 14.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

BANDHU NAIK (PLAINTIFF) *v.* LAKHI KUAR AND ANOTHER (DEFENDANTS).*

Transfer of suit—Civil Procedure Code, s. 25—Court to which suit is transferred deciding suit on evidence taken by Court from which suit is transferred.

Where the trial of a suit was commenced by a Subordinate Judge, and then transferred by the District Judge to his own file under s. 25 of the Civil Procedure

* First Appeal No. 114 of 1884, from a decree of G. J. Nicholls, Esq., Officiating District Judge of Azamgarh, dated the 27th June, 1884.

Code, and the latter did not re-take the evidence, but dealt with the case as it came to him from the Subordinate Judge, and dismissed the suit,—*held* that the District Judge had not "tried" the case within the meaning of s. 25 of the Code.

1885

BANDHU NAIK v. LAKHI KUAR.

THE plaintiff in this case claimed Rs. 30, the price of a bullock sold and delivered to one Raja Ram, represented in the suit by the defendants. The trial of the suit was commenced by the Subordinate Judge of Azamgarh, and after he had taken evidence, the District Judge of Azamgarh transferred the suit to his own file, under s. 25 of the Civil Procedure Code. The District Judge did not retake the evidence, but dealt with the case as it came to him from the Subordinate Judge. He found that the sale of the bullock was not proved, and dismissed the suit. The plaintiff appealed to the High Court.

Munshi *Kashi Prasad*, for the appellant.

Munshi *Sukh Ram*, for the respondents.

The Court (PETHERAM, C.J., and BRODHURST, J.) delivered the following judgment:—

PETHERAM, C. J.—We think that the appeal must be allowed, and the suit tried again. The question is, whether it has been tried. The trial was commenced by the Subordinate Judge, and the suit was then transferred by the District Judge to his own file under s. 25 of the Civil Procedure Code. By that section the District Judge had power to transfer and try it. But inasmuch as the evidence was not taken before the District Judge, we do not think that he has *tried* the case. The decree must be set aside, and the case remanded to the Court which has cognizance of suits of the nature of the present one for trial on the merits.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

1885 *January* 15.

AZIMAN BIBI AND ANOTHER (PLAINTIFFS) *v.* AMIR ALI AND OTHERS (DEFENDANTS)*.

Pre-emption—Mortgage by conditional sale—Wajib-ul-arz—"Transfer"—Act IV of 1882 (Transfer of Property Act), s 58.

A clause in the *wajib-ul-arz* of a village gave a right of pre-emption in respect of "transfer" by the sharers of their rights and interests by sale and mortgage.

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* Second Appeal No. 35 of 1884, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 27th August, 1883, reversing a decree of Muhammad Hafiz Rahim, Munsif of Bansgaon, dated the 28th June, 1883.

1885

AZIMAN BIBI
v.
AMIR ALI.

Held that a deed of conditional sale of a share in the village, which did not transfer possession, was a transfer of an interest in the village, and was sufficient to let in the right of pre-emption. *Sheoratan Kuar* v. *Mahipal Kuar* (1) followed.

THE plaintiffs in this suit claimed to enforce the right of pre-emption in respect of a mortgage by conditional sale of an eight pies share of a village called Bamnauli, dated the 31st August, 1882. The claim was based on a clause of the *wajib-ul-arz* of the village, which was to the following effect :—

"According to the proportion of the land or share in possession, every sharer has the power of transferring his rights and interests (*hakkiyat*) by means of sale and mortgage. But it is a condition that, at the time of transfer, whosoever may be desirous of transferring his rights and interests (*hakkiyat*), then first his nearest sharer will be entitled; and, in case of his refusal, the transfer will be made in favour of other sharers in that thok ; and, in case of their refusal, in favour of sharers in the other thok; and when all these refuse or decline to give the proper price, then the transfer may be made in favour of others, and then no sharer will have the right of pre-emption."

The plaintiffs were sharers in the same thok as the conditiona vendor of the share claimed, while the conditional vendees, defendants, were "strangers," that is to say, were not sharers in the village. The conditional sale was not one with possession.

The Court of first instance (Munsif of Bansgaon) decreed the claim. On appeal, the lower appellate Court (Subordinate Judge of Gorakhpur) reversed the decree, observing as follows:—"The point to be determined is, whether a claim of pre-emption can be set up in respect of a document of conditional sale, without possession, in the way of a hypothecation. The principle of pre-emption is, that a neighbour or a partner should not be inconvenienced by a stranger gaining possession. When the loan is under hypothecation, and possession has not been transferred, there can be no right of pre-emption. What injury is shown to the plaintiffs by this mortgage without possession?"

The plaintiffs appealed to the High Court, contending that the decree of the lower appellate Court was opposed to the terms of the *wajib-ul-arz*.

(1) *Ante*, p. 258.

1885

AZIMAN BIBI v. AMIR ALI.

Mr. *J. Simeon*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The Court (PETHERAM, C. J., and BRODHURST, J.) delivered the following judgment:—

PETHERAM, C. J.—The sole question in this case is, whether this deed of conditional sale included a transfer of an interest in the property, and reference need only be made to s. 58 of the Transfer of Property Act, which defines every mortgage as including a transfer of an interest in the property hypothecated for the purpose of a security. A deed of conditional sale of this kind is a mortgage, and some interest in the property is transferred. This is sufficient to let in the right of pre-emption, and it is not necessary that there should be a transfer of possession. On this point we hold that the recent decision of the Full Bench in *Sheoratan Kuar* v. *Mahipal Kuar* (1) is binding upon us, and the result is that this appeal must be allowed with costs.

Appeal allowed.

REVISIONAL CIVIL

1885 *January* 15.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

HAR PRASAD AND ANOTHER (PETITIONERS) *v.* JAFAR ALI (OPPOSITE PARTY.)*

Civil Procedure Code, s 622—*High Court's powers of revision*—"*Jurisdiction*"—*Limitation*—*Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No.* 164.

Where property had been attached in execution of a decree, *held* that the date on which the property was attached, and not the date of the sale in execution, being the date of executing the first process for enforcing the decree, was the date from which limitation should be computed under art. 164, sch. ii of Act XV of 1877. *Pachu* v. *Jaikishen* (2) referred to.

A Court which admits an application to set aside a decree *ex-parte* after the true period of limitation has expired, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision

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* Application No. 197 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of G. J. Nicholls, Esq., Offg District Judge of Azamgarh, dated the 3rd May, 1884.

(1) *Ante*, p. 258. (2) Weekly Notes, 1884, p. 322.

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by the High Court under that section. *Amir Hasan Khan* v. *Sheo Baksh Singh* (1) and *Maqni Ram* v. *Jiwa Lal* (2) commented on by MAHMOOD, J.

Per MAHMOOD, J.—The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hasan Khan* v. *Sheo Baksh Singh* (1) must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority.

THIS was an application for revision under s. 622 of the Civil Procedure Code, made under the following circumstances:—On the 15th September, 1882, an *ex-parte* decree was passed by the Munsif of Azamgarh against Jafar Ali. In execution of that decree, the property of Jafar Ali was attached on the 19th June, 1883, and on the 15th September, 1883, a sale proclamation was made. On the 20th November, 1883, the sale in execution took place. On the 13th December the judgment-debtor presented an application under s. 108 of the Civil Procedure Code for setting aside the *ex-parte* decree, alleging that by the fraud of the decree-holders he had not had knowledge of the suit and the execution-proceedings. The Munsif allowed the application. The decree-holders appealed to the District Judge of Azamgarh, contending that the application of the 13th December should not have been allowed by the Munsif, on the ground that it was barred by limitation under art. 164, sch. ii of the Limitation Act, more than thirty days having passed since the 19th June, 1883, when the property was attached in execution.

The District Judge observed:—"The Court considers that the date of the sale (20th November, 1883) is the date of execution of process under art. 164 of sch. ii, Act XV of 1877." He held that the application was not barred by limitation, and that the judgment-debtor, Jafar Ali, had no notice of the original suit, but he did not try the questions whether the judgment-debtor had notice of the execution-proceedings, and whether the decree-holders had acted in the fraudulent manner alleged. He dismissed the appeal with costs.

The decree-holders applied to the High Court for the revision of this order under s. 622 of the Civil Procedure Code, on the ground that the lower Courts had exceeded their powers in entertaining the application to set aside an *ex-parte* decree after the

(1) I. L. R., 11 Calc. 6. (2) *Ante*, p. 335.

time allowed by the Law of Limitation. On the other side it was objected that the High Court had no power of revision in the case under s. 622.

Munshi *Hanuman Prasad*, for the petitioners.

Munshi *Kashi Prasad*, for the opposite party.

OLDFIELD, J.—(After stating the facts, continued):—Art. 164 of the Limitation Act provides thirty days, as the period of limitation for an order to set aside a judgment *ex-parte*, from the date of executing any process for enforcing the judgment, and by s. 4 of the Act it is enacted that "subject to the provisions contained in ss. 5 to 25 inclusive, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule of the Act, shall be dismissed, although limitation has not been set up as a defence."

When therefore a Court has admitted an application to set aside an *ex-parte* judgment in contravention of the Law of Limitation, it must be held to have acted in the exercise of its jurisdiction illegally within the meaning of s. 622, and, there being no appeal to this Court in the case, this Court has, in my opinion, powers of revision under s. 622 of the Civil Procedure Code.

In the case before us the Judge erred in his application of the Law of Limitation. The period of limitation will run from the date of executing any process for enforcing the judgment; and in this case will run from the date of attachment of the property of the judgment-debtor in execution of the decree; and the application will be barred unless the judgment-debtor has been kept by means of fraud from the knowledge of his right to make the application. This is a question which the Judge must determine before he can properly entertain the application.

The order is set aside, and the case will go back to the Judge for disposal with reference to the above remarks. Costs to follow the result.

MAHMOOD, J.—The question whether the order of the District Judge can be revised by this Court, under s. 622 of the Civil Procedure Code, opens up a very important question of law, in discussing which it is not necessary to go further back than Act VIII of 1859, the old Code of Civil Procedure. That Act,

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as it originally stood, does not seem to have contained any provisions enabling the High Courts to interfere in revision, but s. 35 of Act XXIII of 1861 laid down the following rule :—"The Sudder Court may call for the record of any case decided on appeal by any subordinate Court in which no further appeal shall lie to the Sudder Court, if such subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law ; and the Sudder Court may set aside the decision passed on appeal in such case by the subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right."

It is important to notice here that the only cases in which the High Court had power to interfere in revision were those "decided on appeal," and in which the subordinate appellate Court had "exercised a jurisdiction not vested in it by law." So the law stood until Act X of 1877 was passed. S. 622 of that Act was as follows :—"The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested ; and may pass such orders in the case as the High Court thinks fit." The changes here made are two ; *first*, that not only the judgments of the subordinate appellate Courts, but those of Courts of first instance, might be interfered with in revision ; and *secondly*, that the cases in which such interference was justified were not only those in which there was *assumption* by the lower Court of a jurisdiction which it did not possess, but also cases in which there was *failure* to exercise a jurisdiction which it did possess. There was, therefore, a clear increase of the powers of revision, and it is important to see how legislation on this subject went further. S. 92 of Act XII of 1879 gave the High Court the power to interfere, not only in the two kinds of cases mentioned in s. 622 of the Code of 1877, but also in cases where the lower Court appeard "*to have acted in the exercise of its jurisdiction illegally or with material irregularity*," thus distinctly conferring a *third* power, distinct from those which the High Court previously possessed. Now s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879, has been reproduced *verbatim* in the present Code, and therefore all arguments and decisions which apply to

the former section apply equally to the present. The question then arises, how the present section is to be interpreted. Does it mean that in cases where "no appeal lies to the High Court," the revisional powers of the Court are co-extensive with those which it has in second appeal by virtue of s. 584 of the Code? I cannot think that it means this. Here I may refer to the Full Bench case, decided by this Court, of *Maulvi Muhammad* v. *Syed Husain* (1), in which the majority of the Judges held that when, under s. 622 of Act X of 1877, the High Court had called for the record of a case in which no appeal lay to it, it might, under that section, pass any order in such case which it might have passed if it had dealt with the case as a second appeal. The late Chief Justice even went further, and held that the High Court might, under that section, pass in such case any such order as it thought proper, whether in regard to fact or law. A similar view of s. 622 was taken by the Madras High Court in *Subbaji Rau Srinivasa Rau* (2), where it was held that where the lower Court had failed to do so, the High Court was competent to interfere in revision on the ground of fraud vitiating execution-sales.

Another case to which I wish to refer is *Shiva Nathaji* v. *Joma Kashinath* (3) in which West, J., in an elaborate judgment, with which, speaking generally, I agree, explained the scope of the revisional powers of the High Courts. All these rulings, however, with the exception of the principles of the last, must now be regarded as superseded by the recent decision of the Privy Council in *Amir Hasan Khan* v. *Sheo Baksh Singh* (4); but before I deal with the judgment in that case, I wish to refer to the recent Full Bench ruling of this Court in *Magni Ram* v. *Jiwa Lal* (5), in which the decision of their Lordships of the Privy Council was followed. That ruling was to the effect that the Privy Council had decided that only questions relating to jurisdiction can be entertained under s. 622.

I was a party to this ruling of the Full Bench, and I am anxious that its precise meaning (or at least my meaning in concurring in it, and effect should not be misunderstood. The ques-

(1) I. L. R., 3 All. 203.
(2) I. L. R., 2 Mad. 264.
(3) I. L R., 7 Bom. 341.
(4) I. L. R., 11 Calc. 6.
(5) *Ante*, p. 336.

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tion is, what was decided by the Privy Council in the case referred to? The substance of the judgment is contained in the concluding words of the penultimate paragraph :—"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case ; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

The view of law here expressed is of course binding upon this Court, and I proceed to consider the exact meaning of the passage. And in doing so it seems to me that the word "*jurisdiction*," as used by their Lordships of the Privy Council, is the most important word.

The word in its ordinary meaning simply means the legal power or authority of hearing and determining disputes for the purposes of administering justice, and in its broad legal sense it may be taken to mean the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority. Such limitations may either be territorial or pecuniary with reference to the value of the subject-matter in litigation, or they may relate to the nature of the litigation, or the domicile and nationality of the parties, or the class or rank to which the tribunal belongs.

I am of opinion that the expression, as used by their Lordships, must be understood in its broad sense and not too narrowly, and this interpretation is supported by the fact that in the last paragraph of their judgment their Lordships say that "the Judicial Commissioner had no *jurisdiction* in the case" under s. 622 of the Civil Procedure Code. Considering that the Judicial Commissioner exercises in Oudh (to use their Lordships' own words) "the same *powers* as the High Court," the *dictum* cannot be understood to mean that he had no "*jurisdiction*," in the narrow sense of the word, to entertain an application for revision under s. 622 in the case. I understand the passage simply to mean that he had exceeded his powers, and that his order was therefore *ulta vires*.

Understanding in this sense the word "*jurisdiction*" in the judgment of the Privy Council, I proceed with my views in regard to the revisional powers of this Court under s. 622 of the Civil Procedure Code. I have already said that the section contemplates three cases in which the revisional powers of the High Court may be exercised. The *first* is *assumption* by the lower Court of a jurisdiction which it does not possess. The *second* is its *failure* to exercise a jurisdiction which it does possess. The *third* is where there is neither of these two, but there is exercise of the jurisdiction which the Court possesses, and has exercised in a manner which is vitiated by illegality or material irregularity. The precise question before the Privy Council was, whether or not a particular suit was barred by s. 13 or s. 43 of the Civil Procedure Code. Now I think it can be shown by considering this question that there may be a decision which is made in the legal exercise of jurisdiction which is erroneous, but not illegal or materially irregular. I gather from the report in *Amir Hasan Khan* v. *Sheo Baksh Singh* (1) that the lower Courts had found that the matter in issue was not *res-judicata* under s. 13, and that it could not have been included in the former litigation so as to be affected by s. 43. In that case no appeal lay from the decision of the lower appellate Court to the Judicial Commissioner, because s. 21 of the Oudh Civil Courts Act allows no second appeal from two concurrent judgments of lower Courts. In such a case I myself should not think it right to interfere in revision. The lower Courts had jurisdiction, and did not exercise it in any illegal or irregular manner. But suppose either of the Judges in that case had said:—"It is true that this same matter, which is now in dispute, was litigated before under the circumstances described in s. 13 of the Code; but although it was then tried and decided, the Judge trying the former suit appears to me to have decided erroneously, and I shall therefore try it myself, and determine it according to my own views." Or suppose the Court had said:—"This claim could, no doubt, have been made a part of the suit which was formerly tried, but the circumstances are such that I think it would be inequitable to apply the provisions of s. 43, and I therefore allow the plaintiff to sue." In these cases I think that there would be an exercise of

(1) I. L. R., 11 Calc. 6.

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jurisdiction, but "illegally" and "with material irregularity." Or to take a case which actually came before my brother Oldfield and myself a few days ago. Suppose that a Judge, professing to act under s. 206 of the Civil Procedure Code, which empowers him in certain cases to amend his decree, chooses to say that "dismissed" means "decreed," and proceeds practically to alter the whole nature of the decree. There again we have jurisdiction, in its narrow sense, existing in the Judge, but exercised by him "illegally" and "with material irregularity." Or, again, take s. 624 of the Civil Procedure Code, which provides that (except in certain cases) "no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it." And suppose that a Judge, disregarding this provision, reviews the judgment of his predecessor. I think that here, too, we have an example of jurisdiction being exercised illegally and with material irregularity. Once more, take the case of the Judge of a Small Cause Court (from whose decision there is no appeal), before whom a claim for Rs. 50 is brought, and witnesses produced, but who dismisses the claim without having heard the witnesses, on the ground that the plaintiff's story is obviously untrue. This is another instance of an illegal or materially irregular exercise of jurisdiction.

And so in the present case. Upon the findings recorded by the Judge, it is clear that he, though professing to apply the law of limitation, has in fact contravened the provisions of that law as contained in s. 4 of the Limitation Act. To allow an application of the kind referred to in art. 164 of sch. ii to be made after the true period of limitation has expired is to act, not indeed without jurisdiction in its narrow sense, but "in the exercise of jurisdiction illegally or with material irregularity," in other words, to act *ultra vires*.

This is all that I desire to say in this case regarding the scope of the revisional powers of the High Court as explained by their Lordships of the Privy Council. The Full Bench ruling of this Court in *Magni Ram* v. *Jiwa Lal* (1) does not appear to me to go beyond the views which I have expressed, and if I had thought otherwise I should not have assented to it.

The reason why I hold the District Judge to have decided wrongly on the question of limitation is this. Art 164 of sch ii of

(1) *Ante*, p. 336.

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the Limitation Act makes the period of limitation for an application by a defendant for an order to set aside a judgment *ex-parte* to run from "the date of executing any process for enforcing the judgment." In the case of *Pachu v. Jaikishen* (1) it was held that "any" process must be taken to mean "first" process, and for obvious reasons I agree with that decision. Here the first process for enforcing the judgment of the 15th September, 1882, was the attachment of the property on the 19th June, 1883. The application to set aside the judgment was not made till the 13th December, 1883, and was therefore obviously barred by limitation. The Munsif, however, held on the evidence before him that the decree-holder was guilty of fraud in concealing the proceedings both of the suit and of the execution from the judgment-debtor Jafar Ali, and that the judgment-debtor is therefore entitled to claim the benefit of s. 18 of the Limitation Act. The Judge, in consequence of his mistake as to the period of limitation, did not go into the merits of the question, namely, into the question of fraud, and whether the execution-proceedings were within the knowledge of the defendant. I therefore concur in my brother Oldfield's order allowing the application, setting aside the Judge's order, and remanding the case to him for disposal on the question of fraud.

APPELLATE CIVIL.

1885
January 22.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

AZIZULLAH KHAN AND OTHERS (DEFENDANTS) *v.* AHMAD ALI KHAN AND OTHERS (PLAINTIFFS).*

Muhammadan Law—Muhammadan widow—Dower—Widow's heirs—Determination of amount of dower—Admission by co-defendant.

A Muhammadan widow lawfully in possession of her husband's estate occupies a position analogous to that of a mortgagee, and her possession cannot be disturbed until her dower-debt has been satisfied, and after her death her heirs are entitled to succeed her in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery.

Held that the ruling of the Court in *Balund Khan v. Janee* (2) that where a defendant is found to be in possession of landed property in lieu of dower, and it

* Second Appeal No 3 of 1884, from a decree H. D. Willcock, Esq., District Judge of Azamgarh, dated the 25th July, 1883, affirming a decrek of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 24h4 April, 1883.

(1) Weekly Notes, 1884, p. 322. (2) N.-W. P. H C. Rep, 1870, p. 319.

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is held that the plaintiff is not entitled to sue for possession of the property until such claim for dower has been satisfied, it is not necessary to determine the question of the amount of such dower, the matter being one which could be settled properly in a suit for an account of what was due as dower, was not applicable to a case where the plaintiffs seeking to recover possession did not claim as heirs of the widow's husband, but as heirs of the widow herself, and where the decree for possession passed in their favour would remain undisturbed even if an amount less than that fixed by the lower appellate Court were found to be what was due as dower.

In a suit for possession of immoveable property brought by three Muhammadan brothers, their three sisters were impleaded as defendants under s. 32 of the Civil Procedure Code, and two of the latter subsequently filed a written statement in which, after stating that they were on good terms with their brothers the plaintiffs and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would, on some future occasion, "settle with their own brothers as to their right and costs." The third sister did not appear to defend the suit.

Held that the lower Courts were wrong in treating this admission as sufficient to entitle the plaintiffs to a decree for possession, not only of their own share, but also of the shares of their three sisters, it being a fundamental proposition connected with the administration of justice that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right or delegate the authority to one for more than his own share in property. *Lachman Singh* v. *Tansukh* (1) referred to.

THE plaintiffs in this suit claimed, as the heirs of Jamiyat Bibi, widow of one Ziáullah, possession of certain immoveable property, of which at the time of her death she had been in possession in lieu of dower. Ziaullah, a Sunni Muhammadan, died in September, 1876, possessed of a 2-anna share in a village and a moiety of two houses. He left as his heirs Jamiyat Bibi and a brother's son, Azizullah, who had married his daughter by Jamiyat Bibi. This daughter had predeceased her father, leaving two sons by Azizullah, named Fateh Muhammad and Muhammad Bakar. According to the Muhammadan Law, three-fourths of the estate of Ziaullah devolved on Azizullah, and one-fourth on Jamiyat Bibi. Jamiyat Bibi died in 1878. If she was a Shia, her heirs were, it was admitted, the sons of her daughter, Fateh Muhammad and Muhammad Bakar. If she was a Sunni, her heirs were, it was admitted, her brother Ahmad Ali, one of the plaintiffs in this suit, and her sister Dulari. Dulari died in 1881, leaving as her heirs three sons, Nasir Ali, Abdul Karim, and Amin Khan, the other plaintiffs in

(1) I. L. R., 6 All. 395.

this suit, and three daughters, Kulsum, Khadija, and Shafia. In 1882, Ahmad Ali and the three sons of Dulari instituted the present suit against Azizullah and his two sons, Fateh Muhammad and Muhammad Bakar, for possession of the two annas share and the moiety of the houses mentioned above. They alleged that Jamiyat Bibi was a Sunni; that according to the law of that sect her estate devolved on them to the exclusion of the defendants; that, on the death of Ziaullah, Jamiyat Bibi had been placed by the defendant Azizullah in possession of the property in suit in lieu of the dower-debt due to her amounting to Rs. 17,000; that on her death the defendants had wrongfully taken possession of the property, and had alleged in a petition presented to the Revenue Court that 1½ annas of the 2-anna share was the property of the defendant Azizullah as heir to Ziaullah, and, Jamiyat Bibi being a Shia, the remaining ½ anna, the property of the other defendants as her heirs. The defendants set up as a defence to the suit that one-fourth only of the estate of Ziaullah devolved on Jamiyat Bibi, and the remaining three-fourths on the defendant Azizullah; that Jamiyat Bibi had not been placed in possession of the property on her husband's death, but, on the contrary, the defendant Azizullah had taken possession; that her dower was not Rs. 17,000, but "Fatima's" dower, and she had remitted the amount; and that she was a Shia and not a Sunni, and therefore her property devolved on the defendants Fateh Muhammad and Muhammad Bakar, her daughter's sons, according to the law of inheritance governing Shias.

On the 24th January, 1883, Kulsum, Khadija and Shafia were made defendants in the suit. On the 12th March, 1883, two of them, Kulsum and Khadija, filed a written statement, in which, after stating that they were on good terms with their brothers, and that the suit hadbeen instituted with their knowledge and permission, they praye d that the suit might be decreed, subject to the condition that they might, on some future occasion, "settle with their own brothers as to their right and costs." Shafia did not appear to defend the suit.

The Court of first instance (Subordinate Judge of Azamgarh) found that Jamiyat Bibi was a Sunni; that on the death of her

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husband she had been placed in possession of the property in suit by the defendant Azizullah, and was in possession when she died; and that there was a dower-debt due to her at the time of her death. It held on these findings that, as Jamiyat Bibi, being in lawful possession, and a dower-debt being due to her, had a right to possession till the debt was satisfied, the plaintiffs, as her heirs, were entitled to possession of the property under the same conditions; and it accordingly gave the plaintiffs a decree "for possession of the property in suit as heirs of Jamiyat Bibi, deceased," and directing that they "should continue in possession of the property decreed until the dower-debt of Jamiyat Bibi was paid." On appeal by the defendants, the lower appellate Court (District Judge of Azamgarh) affirmed this decree. It found, amongst other things, that the dower-debt of Jamiyat Bibi was Rs. 17,000, and that possession of the property in suit had been relinquished to her in lieu of that debt.

In second appeal the defendants urged in their memorandum of appeal—(i) that the District Judge was not competent to entertain the appeal, the value of the subject-matter exceeding Rs 5,000, the pecuniary limit of his jurisdiction; (ii) that as Jamiyat Bibi, having herself applied to be recorded in the revenue registers as an heir to Ziaullah, had made no mention of a dower-debt, the plaintiffs who represented her could not be allowed to plead otherwise; (iii) that there was no evidence to show that the defendant Azizullah had placed Jamiyat Bibi in possession in lieu of dower; (iv) that the plaintiffs were not entitled to sue for possession of the property, though they might have a right to sue for what was due to the estate of Jamiyat Bibi by way of dower; (v) that the District Judge was not competent in this suit to determine finally what was due for dower; (vi) that the finding that the defendants had not been in possession of the property since the death of Ziaullah was erroneous; and lastly, that "the decree for the whole estate in favour of the plaintiffs was wholly wrong, and the petition filed by Kulsum Bibi and Khadija was not sufficient to create any right in the plaintiffs."

Mr. *T. Conlan*, Pandit *Ajudhia Nath*, and Munshi *Kashi Prasad*, for the appellants.

Mr. *W. M. Colvin* and Pandit *Bishambar Nath*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgments :—

MAHMOOD, J.—The first ground of appeal has no force, because the record fails to show that the subject-matter of the suit exceeds Rs. 5,000 in value. Nor do the findings of the lower Courts on the merits of the evidence leave room for the entertainment of the question raised in the second, third, sixth, and seventh grounds of appeal. The lower Courts have found that the deceased Musammat Jamiyat was a Sunni; that upon the death of her husband, Ziaullah, she obtained, with the acquiescence of his heirs, possession of the whole of his estate in lieu of dower; that the houses (to which the seventh ground of appeal before us relates) form part of his estate, and were in possession of the deceased lady whose dower has never yet been paid. These findings, which are based upon the evidence before the lower Courts, cannot be disturbed in second appeal. But it is contended by the appellants in their fourth ground of appeal that, even upon the findings at which the lower Courts arrived, the plaintiffs, as heirs of the deceased lady, were not entitled to maintain a suit for possession, and that their only remedy was to sue for recovery of such sum as may be due to the estate of the deceased lady as her dower. I am of opinion that this contention is based upon an erroneous view of the law. It has been held in many cases by this Court and the Lords of the Privy Council, that a Muhammadan widow, lawfully in possession of her husband's estate, occupies a position analogous to that of a mortgagee, whose possession cannot be disturbed until the dower-debt has been satisfied. Jamiyat's position having been found to be of this nature, the plaintiffs, as her heirs, are entitled to succeed her in possession of the property.

In support of the fifth ground of appeal, the learned pleader for the appellants has cited the ruling of this Court in *Balund Khan* v. *Janee* (1) in which it was held that, where a defendant is found to be in possession of landed property in lieu of dower, and it is held that the plaintiff is not entitled to sue for possession of the

(1) N.-W. P. H. C. Rep., 1870, p 319.

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property until such claim for dower has been satisfied, it is unnecessary to determine the question of the amount of such dower, the matter being one which could be settled properly in a suit for an account of what is due as dower. Relying upon this ruling, the learned pleader asks us to set aside so much of the judgments of the lower Courts as relate to the finding that Jamiyat's dower amounted to Rs. 17,000. Without doubting the authority of the ruling cited, I am of opinion that it is not on all fours with the present case, as here the plaintiffs, who seek to recover possession, do not claim as heirs of Ziaullah, but as heirs of his widow Jamiyat. Whatever the effect of the finding may be, I do not think we are called upon to consider the question in this case, because the decree for possession passed in favour of the plaintiffs would remain undisturbed, even if an amount less than Rs. 17,000 was found to be the deceased lady's dower.

The only ground of appeal which remains to be considered is the last, which raises the question whether the lower Courts were right in law in decreeing the whole of the estate of Jamiyat in favour of the plaintiffs. The plaintiff Ahmad Ali is the brother of the deceased lady, and the plaintiffs Nasir Ali, Abdul Karim, and Amin Khan are the sons of Dulari, sister of the deceased lady. Jamiyat died in 1878, and her sister Dulari died in 1881, leaving, not only the three sons, but also three daughters, namely, Kulsum, Khadija, and Shafia, who have not joined the suit as plaintiffs. It is obvious that, under these circumstances, the share inherited by Dulari devolved also upon her three daughters to the extent provided by the Muhammadan Law. There is no allegation that they have conveyed their rights and interests to the plaintiffs; but it appears that, in the course of the trial of the suit in the Court of first instance, they were impleaded as defendants under s. 32 of the Civil Procedure Code, and on the 12th March, 1883, only two of them, *viz*, Kulsum and Khadija, filed a written statement, in which, after stating that they were on good terms with their brothers, the plaintiffs, and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would on some future occasion "settle with their own brothers as to their right and costs." The lower Courts have treated this admission as sufficient

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to entitle the plaintiffs to a decree for possession, not only of their own share but also of the share of the three daughters of Dulari. Shafia did not appear to defend the suit. I am of opinion that the view of the case taken by the lower Courts was erroneous in law. I take it as a fundamental proposition connected with our system of administering justice that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right, or delegate the authority, to one for more than his own share in property. A similar question was decided in the case of *Lachman Singh* v. *Tansukh* (1) in which I concurred in the views of my learned brother Oldfield. I still entertain the same opinion upon this question of law, and if it were necessary to add anything to what was said by my learned brother in that case, I should say that one reason for not giving effect to such admissions against a co-defendant is, that it deprives the defendant against whom such admissions are used of the opportunity of raising pleas which might be raised, if the defendants making the admission appear in Court as plaintiffs suing for their rights.

Under this view of the case the decree of the lower Courts should be modified by dismissing the suit to the extent of the share of the three daughters of Dulari.

OLDFIELD, J., concurred.

The case was remanded to the lower appellate Court for a finding on the following issue:—

"What is the exact extent of the share of the plaintiffs, exclusive of the shares of Kulsum, Khadija, and Shafia ?"

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885 *January* 24.

KIFAYAT ALI AND ANOTHER (JUDGMENT DEBTORS) *v.* RAM SINGH (DECREE-HOLDER).*

Execution of decree—Application withdrawn by decree-holder—Limitation—Act XV. of 1877 *(Limitation Act), sch.* ii., *No.* 179 (4)—*Civil Procedure Code, ss.* 374, 647.

The holder of a decree for money dated the 7th June, 1879, applied on the 20th July, 1880, for execution thereof, but it appeared that in certain particulars

* Second Appeal No 96 of 1884, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 22nd May, 1884, reversing an order of Pandit Ratau Lal, Munsif of (Haveli) Moradabad, dated the 31st March, 1884.

(1) I. L. R., 6 All., 395.

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the decree required correction, and it was therefore ordered, at the request of the pleader for the decree-holder, that the application should be dismissed, and the decree returned to him for amendment. The next application for execution of the decree was made by the decree-holder on the 19th February 1883.

Held that the application of the 20th July, 1880, having been put in and afterwards taken back by the decree-holder, the proceeding became to all intents and purposes as though no application had been made; that therefore it could have no effect as an application made in accordance with law for execution within the meaning of art. 179, sch. ii. of the Limitation Act; that applying the rule contained in s. 374 of the Civil Procedure Code, in accordance with s. 647, to the application for execution of the 19th February, 1883, the question of limitation must be determined as if the first application had never been filed; and that the application now in question was consequently barred by limitation. *Ramanadan Chetti* v. *Periatambi Shervai* (1) dissented from. *Pirjade* v. *Pirjade* (2) referred to.

THE decree of which execution was sought in this case was one for money passed against Kifayat Ali and Wilayat Ali as the sons and heirs of Hidayat-ullah, deceased debtor, and Muhamdi Begam, as widow of Hidayat-ullah, and was dated the 7th June, 1879. On the 20th July, 1880, the decree-holder applied for execution of the decree, asking for attachment and sale of certain immoveable property. The muharrir in charge of execution of decree cases reported to the Court that Muhamdi Begam was not personally liable under the decree, yet execution was sought against her; and that whereas Kifayat Ali and Wilayat Ali were stated in the decree to be the sons and heirs of Hidayat-ullah, deceased debtor, they were stated in the application to be the sons and heirs of Inayat-ullah, deceased debtor, and the property sought to be attached appeared to be Inayat-ullah's property. It appeared that the decree erroneously stated that Kifayat Ali and Wilayat Ali were the sons and heirs of Hidayat-ullah, they being the sons and heirs of Inayat-ullah. On the 3rd August, 1880, the Court passed the following order on the application:—

"To-day, at the hearing of the report, the pleader for the decree-holder stated that he would execute the decree after it had been corrected, and it might be returned. Therefore ordered, that according to the request of the pleader for the decree-holder the case be dismissed, and the decree returned to him." The decree-holder subsequently applied for amendment of the decree, and on the 28th April, 1882, the decree was amended. On the 19th February,

(1) I. L. R., 6 Mad., 250. (2) I. L. R., 6 Bom., 681.

1883, the decree-holder made the next application for execution, being the one out of which this appeal arose. This application the Court of first instance (Munsif of Haveli Moradabad) rejected on the ground that it was barred by limitation. It held that limitation should be computed from the date of the decree, and not the date of the previous application of the 20th July, 1880, as that application was not one for execution of the decree within the meaning of art. 179 of the Limitation Act. On appeal by the decree-holder, the lower appellate Court (Subordinate Judge of Moradabad) held that limitation should be computed from the date of the previous application, and that therefore the present application was within time.

The judgment-debtors appealed to the High Court, contending that the present application was barred by limitation, as the first Court had held.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the appellants.

The respondent did not appear.

The judgment of the Court (OLDFIELD and MAHMOOD, JJ.), after stating the facts, continued as follows :—

OLDFIELD, J.—It appears to us that the application of the 20th July, 1880, can have no effect as an application made in accordance with law for execution within the meaning of art. 179. It cannot be said to have been made at all, having been put in and afterwards taken back,—in fact, what was done in the matter by the decree-holder had been undone by him, and the proceeding became, to all intents and purposes, the same as though no application had been put in.

We are unable to concur in the view taken by the learned Judges of the Madras High Court in *Ramanadan Chetti* v. *Periatambi Shervai* (1). A similar case has been brought to notice, decided by the Bombay High Court—*Pirjade* v. *Pirjade* (2). It was there held that the rule in s. 374 of the Civil Procedure Code is made applicable by s. 647 to applications, and that cl. 4, art. 179 of Act XV of 1877 must be read subject to the rules contained in ss. 374 and 647 of the Civil Procedure Code, and in this view

(1) I. L. R., 6 Mad., 250. (2) I. L. R., 6 Bom., 681.

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we concur. S. 374 is to the effect that "in any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought;" and applying this rule to the application for execution of the 19th February, 1883, which is before us, the question of limitation must be determined as if the application of the 20th July, 1880, had never been filed, and the present application will in consequence be barred by limitation. We set aside the order of the lower appellate Court, and allow the appeal with costs.

Appeal allowed.

1885 *February* 2.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

NIHAL CHAND (DEFENDANT) *v.* AZMAT ALI KHAN (PLAINTIFF).*

Public highway—Diversion of road—Right of owners of land adjoining old road —Grant by Municipality of land forming old road—Act XV of 1873 *(N.-W. P. and Oudh Municipalities Act), s.* 38.

There is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land.

S. 38 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act) was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such rights on the Municipality, nor has the section any such effect.

In a case where such land ceased to be used as a public highway, and was granted by the Municipality to third persons, who proceeded to build thereon,—*held* that the owners had a good cause of action against such persons for the demolition of the buildings and restoration of the property to its original condition.

THE facts of this case, so far as they are material for the purposes of this report, were as follows. The plaintiff in this suit was one of the co-sharers in a patti in "*Qasbah*" Muzaffarnagar, that is to say, in the town of Muzaffarnagar. In this patti there was a plot of land numbered 2566 in the "*khasra abadi*" or list of town lands. The plaintiff, alleging that the defendant had wrongfully built on this plot, sued the latter for the demolition of the buildings and the restoration of the land to its original condition. The defence to the suit was that the land in suit formed a public road, and was therefore the property of the Municipality, under s. 38 of Act XV of 1873, and consequently the plaintiff had no

* Second Appeal No. 124 of 1884, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saháranpur, dated the 10th December, 1883, modifying a decree of Maulvi Muhammad Ruhullah, Munsif of Shamli, dated the 22nd June, 1883.

right to sue; and further that the road having been diverted from the land in question, and such diversion having deprived the defendant of a portion of a house belonging to him, the Municipality had made a grant of the land in question to the defendant, and he was entitled to build thereon. The Court of first instance (Munsit of Shamli) held that the proprietary right of the plaintiff and his co-sharers in the land was not extinguished, because by s. 38 of Act XV of 1873 the road was vested in, and became the property of, the Municipality, and that the Municipality was not competent to make a grant of the land to the defendant. It further held that as the road had been abandoned, the land reverted to the plaintiff and his co-sharers in the patti. It therefore held that the suit was maintainable, and gave the plaintiff a decree in respect of the land as claimed. On appeal by the defendant, the lower appellate Court (Subordinate Judge of Saháranpur) affirmed this decree.

On second appeal by the defendant it was contended on his behalf that the Municipality were competent to convey the land to him, and that it did not revert to the zamindars of the patti because the road was abandoned.

For the respondent it was contended that the zamindars of the patti in which the land was situate had a proprietary right in it although it was used as a public road; that s. 38 of Act XV of 1873 only vested the road in the Municipality and could not extinguish such proprietary right; that the Municipality had no power to convey the land to the appellant; and that, when the road was abandoned, the zamindars acquired full proprietary rights in the land. *Empress* v. *Brojonath Dey* (1) was referred to.

Munshis *Kashi Prasad* and *Hanuman Prasad*, for the appellant.

Messrs. *W. M. Colvin* and *G. T. Spankie* and Pandit *Bishambhar Nath*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The plaintiffs are zamindars of "*Qasbah*" Muzaffarnagar, and sue the defendant, who is also a zamindar, on the allegation that a plot of land, comprising 175 square yards, formed a portion of a highway connecting Sulabtanganj with the

(1) I. L. R., 2 Calc., 425.

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Shamli road and waste land adjoining it, entered as No. 2566 in the "*abadi khasra*," was owned by the plaintiffs and other co-sharers, and defendant has wrongfully enclosed it; also that another piece of land, comprising 28 square yards, No. 1300, is land adjoining the Shamli road, on which the defendant has built a *chabutra*. Plaintiffs seek to have the erections made by defendant demolished and the land restored to its original state. The defendant admits that the 175 square yards in No. 2566 was once part of a road, but alleges that the Municipality, in straightening the road, diverted it from this portion, and took the road through a portion of a house belonging to defendant, and gave the above land to him in exchange for the land taken; and that No. 1300 is part of an existing public road to which the plaintiffs have no right. The Court of first instance (Munsif) decreed the entire claim. The Subordinate Judge (lower appellate Court) decreed the claim in respect to No. 2566 and dismissed the rest. The defendant has appealed. We are only concerned with the claim for No. 2566.

The Subordinate Judge has found that this land was formerly a highway, and that the plaintiffs and defendant as the zamindars of the "*qasbah*" are owners of the soil, and since it has ceased to be a highway, they have full rights over it; that the Municipality had no power to make the land over to the defendant; and the latter as a joint owner could not enclose it against the will of the plaintiffs. In our opinion the decision must be affirmed. The land was either a highway or waste land adjoining it, and there is a presumption that such land belongs to the owners of the soil of the adjoining land. The plaintiffs and defendant own jointly, as zamindars of the "*qasbah*," the adjoining land, and the presumption in their favour that they jointly own the highway has not been rebutted.

S. 38 of the Municipalities Act was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such right on the Municipality, nor has the section any such effect. The plaintiffs, as joint owners, now that the land is no longer a public highway, have a good cause of action against the defendant. The appeal is dismissed with costs.

Appeal dismissed.

1885
February 4.

Before Mr. Justice Oldfield and Mr Justice Mahmood.

HUB LAL (JUDGMENT-DEBTOR) *v.* KANHIA LAL AND ANOTHER (DECREE-HOLDERS)*

Execution of decree—Sale in execution—Confirmation of sale—Objection that property is not liable to attachment—Civil Procedure Code, ss. 278, 311, 312.

Held that an objection made by one whose property was attached and s ld in execution of a decree for the payment of money for the performance of which he had become a surety, that he was no party to the decree, and his property was not liable to be attached and sold, and therefore the sale was invalid, was not an objection entertainable under s. 311 of the Civil Procedure Code, and was consequently no ground for setting aside the sale under that section, especially as it was preferred for the first time in appeal, and, moreover, might have been taken under s. 278 at the time of attachment, when the objector would have had his remedy as therein provided.

THIS was an appeal from an order confirming a sale of immoveable property in execution of a decree. It appeared that the appellant had, after the passing of a decree for the payment of money, become surety for its performance, and it had been executed against him, and certain immoveable property belonging to him had been sold on the 20th December, 1883. He objected to the confirmation of the sale on the ground of certain irregularities in the publication and conduct of the sale. The lower Court (Munsif of Etah), by an order dated the 5th March, 1884, disallowed these objections, and confirmed the sale.

It was contended for the appellant that the sale, and the execution-proceedings generally, were void, as he had become liable as surety for the performance of the decree, after it had been made, and therefore the provisions of s. 253 of the Civil Procedure Code were not applicable, and the decree should not have been executed against him.

Babu *Ram Das Chakarbati*, for the appellant.

Munshi *Hanuman Prasad* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—This is an appeal from an order refusing to set aside a sale under s. 312 of the Civil Procedure Code. The first

First Appeal No. 37 of 1884, from an order of Shaikh Sakhawat Ali, Munsif of Etah, dated the 5th March, 1884.

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plea taken is, that the appellant was no party to the decree, and his property, which has been the subject of the sale, was not liable to be attached and sold, and therefore the sale is invalid.

This is not an objection which is entertainable under s. 311, which permits a sale to be set aside for material irregularity in publishing or conducting it, and is not a ground, therefore, for setting aside the sale under that section. We cannot therefore hold that the order refusing to set aside the sale is wrong by reason of this objection.

Moreover, it is now preferred for the first time, and, we may add, was an objection which the appellant might or should have taken under s. 278 at the time of attachment, and he would then have had his remedy as therein provided.

The other pleas fail, as no material irregularity such as the appellant refers to in those pleas has been established. The appeal is dismissed with costs.

Appeal dismissed.

1885
February 6.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

GOBARDHAN DAS (JUDGMENT-DEBTOR) *v.* GOPAL RAM AND OTHERS (DECREE-HOLDERS).*

Execution of decree—The decree to be executed where there has been an appeal.

The effect of the decision of the Full Bench in *Shohrat Singh* v. *Bridgman* (1) is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred to, and the mandatory part of it so affirmed should be executed as though it were the decree of the appellate Court.

Kristo Kinkur Roy v. *Rajah Burrodacaunt Roy* (2) referred to.

Where the first Court of appeal affirmed the decree of the Court of first instance, and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal, and the decree-holder made an application of which the object clearly was to have execution taken under the decree of the appellate Court, by carrying out the mandatory part of the decree of the Court of first instance, *held* that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of last instance, was under the circumstances a mere technical objection, and there was no reason why the execution asked for should not be allowed

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* Second Appeal No. 23 of 1884, from an order of A. F. Millet, Esq., District Judge of Shâhjahânpur, dated the 17th September, 1883, reversing an order of Maulvi Saiyid Muhammad, Munsif of West Budaun, dated the 6th July, 1883.

(1) I. L. R., 4 All., 376. (2) 14 Moo. I. A., 465.

ON the 5th May, 1879, an original decree was passed in favour of the respondents in this case against the appellant. This decree was affirmed, on appeal, on the 29th August, 1879, and, on an appeal being preferred from the appellate decree, that decree was affirmed by the High Court on the 31st May, 1880. The decree-holders made an application for execution to the Court of first instance. In this application the decree sought to be executed was stated to be the original decree, dated the 5th May, 1879. The judgment-debtor objected to this application being granted, on the ground that the decree-holders should have applied for execution of the High Court's decree, that being the final decree in the suit. This objection the Court of first instance allowed, and made an order rejecting the application, referring to *Shohrat Singh* v. *Bridgman* (1). On appeal by the decree-holders, the lower appellate Court reversed this order, and directed the Court of first instance to proceed with the application.

The judgment-debtor appealed to the High Court on the ground, among others, that the decree of the original Court was not executable, having been superseded by the High Court's decree.

Mr. *T. Conlan* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The respondents obtained a decree against the appellant in the Court of the Munsif of West Budaun on the 5th May, 1879. This decree was affirmed on appeal by the District Judge, and on second appeal by the High Court.

The decree-holders applied for execution in the Munsif's Court, and this application was rejected on the ground that the application was irregular, as it was an application to execute the decree of the first Court, whereas it should have been to execute the decree of the High Court, as the final Court of appeal. The District Judge reversed this order, on the ground that, however irregular the application may have been, execution had been allowed without

(1) I. L. R., 4 All., 376.

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objection previously on similar applications, and the judgment-debtor was estopped from objecting to the execution. The judgment-debtor has appealed. His first plea relates to the ground on which the Judge has proceeded; but he has taken another plea, *viz.*, that the decree of the Court of first instance cannot be executed, the decree to be executed being the decree of the High Court, as the final Court of appeal, and in consequence the Munsif's order disallowing execution is correct. I shall deal with the last objection, as it will dispose of the appeal.

The appellant supports the plea by reference to the Full Bench decision of this Court in *Shohrat Singh* v. *Bridgman* (1) and the case of *Muhammad Altaf Ali* v. *Bholanath* (2).

In my opinion there has been a misconception of the meaning and effect of the Full Bench decision, and it does not support the contention of the appellant.

The question which was referred in *Shohrat Singh* v. *Bridgman* was, "where a suit is heard in first or second appeal and a decree is passed, is the decree of the Court of last instance the sole decree which is capable of execution, or may the specifications contained in the decree of the lower Court or Courts be referred to and enforced by the Court to which the application for execution has been made?" and it was held that the "appellate decree is the final decree, and the only decree capable of being executed after it has been passed, whether the same reverses, modifies, or confirms the decree of the Court from which the appeal is made;" but it was added that, where the appellate decrees are not prepared as they should be, by entering the mandatory part of the lower Court's decree, which was affirmed, "but the decree of the lower Court, with all its specifications, is simply affirmed by, and adopted in, the decree of the last appellate Court, it would then be open to the Court executing such last decree to refer to the decree of the lower Court for information as to its particular contents."

The effect is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred

(1) I. L. R., 4 All., 376. (2) Weekly Notes, 1882, p. 126.

to, and the mandatory part of it so affirmed should be executed as though it was the decree of the appellate Court.

This question was raised in the case of *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy* (1). Their Lordships of the Privy Council referred to the decisions of the Calcutta and Madras Courts to the effect that "whether the decree of the lower Court is reversed, or modified, or affirmed, the decree passed by the appellate Court is the final decree in the suit, and, as such, the only decree which is capable of being enforced by execution."

Their Lordships remarked as follows:—"If the question were *res integra*, they would incline to the view that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, for the reasons already given (one of them was that whatever decree is executed is to be executed by the lower Court, in which the record remains or to which it is to be returned) that the question is not of much practical importance, their Lordships will not express any dissent from the rulings of the Madras Court and the Full Bench of the Bengal Court further than by saying that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree."

In the case above noticed, where the appellate Court dismisses the appeal without affirming the decree of the lower Court, it is obviously the lower Court's decree which must be executed, and the necessity of referring to the superseded decree is recognized where the appellate Court's decree has not embodied in its decree the mandatory part of the decree it intended to affirm. Speaking for myself, the decision of the Full Bench of this Court was meant to decide the question in the sense in which it was regarded by their Lordships of the Privy Council.

(1) 14 Moo. I. A., 465.

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It is really, as their Lordships observe, of little practical importance whether the decree of the first Court or the last Court, in cases where the latter affirms the mandatory part, is to be regarded as the decree to be executed, for in either case the Court of first instance executes the decree, and can refer to its own decree for particulars of the mandatory part affirmed.

The objection therefore that the decree-holder has not in his application expressly asked the Court to execute the decree of last instance becomes a mere technical objection, where the object of the application is clear and undoubted.

In the case before us, the first Court of appeal affirmed the decree of the Court of first instance, and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal, and the object of the application was clearly to have execution taken under the decree of the appellate Court, by carrying out the mandatory part of the decree of the Court of first instance, and there was no reason why the execution should not have been allwed. On these grounds I would dismiss the appeal with costs.

MAHMOOD, J.—I concur so entirely in what my learned brother Oldfield has said that under ordinary circumstances I should not have added a single word. But I may add that I have, on several occasions, sitting as a Judge in Oudh, expressed my dissent from the Full Bench ruling of this Court in *Shohrat Singh* v. *Bridgman* (1), and acted upon the contrary opinion, which, of course, I was competent to do, the Courts in Oudh not being bound by the decisions of this Court, and I have in this Court also expressed my dissent from it. I only wish to say that the head-note to the report of that case does not fully explain the scope of the decision, and the judgment itself, if, with all deference to the learned Judges who passed it, I may say so, is liable to misapprehension. My brother Oldfield, however, has now explained its precise scope, and I entirely concur in the rule as explained by him. It has been sreiously misunderstood by the Mufassal Courts, which have, in consequonce, refused execution of decrees in many cases (which have come to my notice) in which it should have been allowed.

Appeal dismissed.

(1) I. L. R., 4 All., 376.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

1885
February 19.

MULA RAJ AND OTHERS (JUDGMENT-DEBTORS) *v.* DEBI DIHAL AND OTHERS (DECREE-HOLDERS)*

Execution of decree—Application for refund of excess payment—Accrual of right to apply—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 178.

The judgment-debtors against whom a decree had been executed applied for a refund of money which they alleged had been recovered in execution by the decree-holders in excess of what was actually due under the decree. Upon this application, an account was taken by order of the Court.

Held that the limitation applicable to the case was that provided by art 178, sch. ii of the Limitation Act, and that the right to apply for the refund of the excess amount paid in execution accrued at the time when the account was taken and stated on the application of the judgment-debtors in the course of the proceedings in execution.

THE respondents in this case, on the 16th July, 1880, applied for execution of a decree for costs which they held against the appellants. This decree had been previously executed, from time to time, since 1872. On the 3rd September, 1880, the judgment-debtors preferred a petition to the Court executing the decree, in which they alleged that the decree-holders had recovered interest in execution of the decree, notwithstanding the decree did not award interest, and in so doing had recovered more than was due on the decree, and prayed that an account might be taken, and if it was found that more had been realized than was due, a refund might be ordered, and if it was found that the decree was still unsatisfied, they might be allowed to pay what was found due. On this application the Court ordered an account to be taken. On the 20th December, 1880, the account having been taken, the Court held that the respondents had improperly recovered interest in execution of their decree, as it did not award interest, and that, the account showing, if the interest improperly realized were credited to the appellants, that the decree had been not only satisfied, but that the respondents had realized Rs. 132 more than was due to them, satisfaction should be entered, and the appellants were entitled to recover the amount paid in excess. The appellants subsequently sued the respondents to recover such amount, but the

* Second Appeal No. 49 of 1884 from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 17th January, 1884, reversing an order of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 18th May, 1883.

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MULA RAJ
v.
DEBI DIHAL.

suit was dismissed on the ground that the amount was not recoverable by a fresh suit, but by application to the Court executing the decree. On the 4th January, 1883, the appellants applied to the Court executing the decree for a refund of the amount which the respondents had improperly recovered in execution of their decree by way of interest, on the ground that the decree did not order the payment of interest. The Court of first instance (Subordinate Judge) allowed the refund applied for. On appeal by the decree-holders the lower appellate Court (District Judge), applying art. 178 of the Limitation Act, held that the application was barred by limitation, computing the period allowed by that article from the 20th November, 1872, when the money, of which the refund was sought, was paid ; and it therefore reversed the order of the first Court.

For the appellants it was contended that limitation had been improperly reckoned from the date when the money was paid to the respondents, and that it should be reckoned from the time the appellants became aware that the recovery of interest in execution of the decree was wrongful.

Munshi *Sukh Ram*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

The Court (PETHERAM, C. J., and STRAIGHT, J.) delivered the following judgment :—

STRAIGHT, J.—We do not find fault with the Judge's application of art. 178 of the Limitation Law, but we differ with him upon the question as to when the right accrued to the appellant to apply to be recouped the excess amount paid by him. We think that the proper date must be that when the account was taken and stated on the application of the defendants in the course of the proceeding in execution to enforce his judgment against the plaintiff. The appeal is decreed with costs, and the order of the Judge being reversed, that of the Subordinate Judge will be restored.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

1885
February 19.

KANJI MAL (DECREE-HOLDER) *v.* KANHIA LAL (JUDGMENT-DEBTOR).*

Execution of decree—Decree payable by instalments—Civil Procedure Code, s. 230—Finality of order made in execution proceedings.

In 1868 a decree was obtained for Rs. 1,100, which provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments should be Rs. 100 at the end of each subsequent year, and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent per mensem. In 1877, the decree-holder applied for execution of the decree, asserting that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200, and four of Rs. 100 each, and that default had been made in payment of the fifth instalment of Rs. 100, and he asked to recover the whole amount due on the decree. No order was passed on this application, and eventually the case was struck off. In 1880, the decree-holder again applied for execution of the decree, upon the same grounds as those upon which the previous application was based. Notice was issued and served, and a warrant issued for the arrest of the judgment debtor, but eventually the case was struck off. In 1883, the decree-holder on the same grounds made another application for execution. It was contended by the judgment-debtor that execution was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and even if they had been paid, they could not be recognised, not having been certified.

Held that the proper time from which to reckon the limitation of twelve years was the fifth year from the date of the bond, the whole claim from the beginning and the order passed in 1880 having gone upon that basis, that the Court could not go behind that order, and that consequently the decree-holder was within time, and might take out execution.

ON the 27th February, 1868, the appellant obtained a decree against the respondent for Rs. 1,100, which provided that, commencing from the 2nd Phagun Sudi Sambat 1925 (13th February, 1869,) instalments of Rs. 100 yearly should be paid (Rs. 200 having been paid on that date); and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent. per mensem. On the 20th April, 1877, the decree-holder applied for execution of the decree. He asserted that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200 and four of Rs. 100 each, and default had been made in

* Second Appeal No 34 of 1884, from an order of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 28th January, 1884, reversing an order of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 1st September, 1883.

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payment of the 5th instalment of Rs. 100, and he asked to recover the whole amount due on the decree. Notice was served on the judgment-debtor; he did not appear; and eventually the case was struck off. On the 17th April, 1880, the decree-holder applied again for execution of the decree, the grounds of the application being the same as those on which the previous application had been based. Notice was issued and served and a warrant issued for the arrest of the judgment-debtor, but eventually the case was struck off. On the 3rd March, 1883, execution was again applied for on the same grounds. Notice was issued, but eventually the case was struck off. On the 2nd April, 1883, the decree-holder made, on the same grounds, the application for execution out of which this appeal arose.

The judgment-debtor contended that the application should not be allowed, inasmuch as the first application for execution, dated the 20th April, 1877, was barred by limitation, as no instalments had been paid, and time began to run from the date of the first default, which occurred more than three years before that application was made. The Court of first instance disallowed this objection on the ground that the judgment-debtor had not at any time, after that application had been made, denied that the instalments which the decree-holder asserted had been paid had not in fact been paid. The lower appellate Court allowed the objection, holding that the application for execution of the 20th April, 1877, should not have been granted, as the payments alleged by the decree-holder to have been made had not been certified, and were therefore not recognizable, and consequently that that application, time running from the first default, was barred by limitation.

It was contended, *inter alia*, for the appellant in this appeal that the lower Court should not have gone behind the previous proceedings.

For the respondent it was contended that execution of the decree was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and, even if they had been paid, the payments could not be recognized, not having been certified.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Babu *Ratan Chand*, for the respondent.

PETHERAM, C. J.—I think that this appeal must be allowed. The question is whether the judgment-creditor is entitled now to execute his decree obtained in 1868. The facts are that in 1868 the judgment-creditor obtained a decree for a sum of Rs. 1,100. By the terms of the decree it was provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments, should be Rs. 100 at the end of each subsequent year. There was a proviso to the effect that, in the event of any instalment not being paid, the whole amount should become due. This happened in 1868, and in 1877 the decree-holder applied to the Court for leave to execute his decree for the balance due, and the account on which he asked this showed that a payment had been made of Rs. 600, that is to say, of the first five instalments, and the claim was made in respect of default in payment of the sixth instalment. For some reason, which is not very apparent, no order was made, and the application was abandoned by the decree-holder. In 1880 another application was made on the basis of the last one, and the result of this was that the decree-holder obtained an order allowing him to issue execution, and ordering the arrest of the judgment-debtor for the amount due, giving credit for what had been paid. On that order nothing was recovered by the decree-holder; and the question now arises whether the proper time from which to reckon the limitation period of twelve years is the date of the decree of 1868, or the time down to which credit was given for payment of instalments. In my opinion, the proper time from which to reckon limitation is the fifth year from the date of the bond. The whole claim from the beginning has gone upon this basis, and the order passed in 1880 also went upon it. It appears to me that we cannot now go behind that order, and that consequently the judgment-creditor is within time, and may take out execution. This seems to me the only conclusion which is in accordance with justice, because the judgment-creditor has always tried to obtain execution.

STRAIGHT, J.—I am of the same opinion.

Appeal allowed.

1885
February 23.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

FAKIR BAKHSH (DEFENDANT) *v.* SADAT ALI AND ANOTHER (PLAINTIFFS) *

Mortgage — Usufructuary mortgage—Satisfaction of mortgage-debt from usufruct—Suit for whole mortgaged property by some of several mortgagors.

In a suit by some of several co-mortgagors to redeem the entire property mortgaged, on the ground that the mortgage-debt had been satisfied out of the usufruct,—*held* that the plaintiffs could only claim their own shares, and the Court of first instance should determine the extent of the shares after making the other co-mortgagors parties.

THE claim in this suit was to redeem a usufructuary mortgage of a two annas and eight pies share in a village called Alawalpur, which share, subsequently to the mortgage, was constituted into a mahal of sixteen annas. It was alleged in the plaint that one of the two mortgagors, Ghulam Haidar, was the proprietor of an eight annas share of the mortgaged property, and that he died leaving two sons, Barkat Ali and Ali Bakhsh; that Barkat Ali, who succeeded to a four annas share of this eight annas share, sold his share to Ghisi Bibi, the wife of the defendant Fakir Bakhsh, the mortgagee; that on the death of Ali Bakhsh his son Bandhu sold the four annas share to which his father had succeeded to Sadat Ali; that the other mortgagor, Muhammad Ali, was the proprietor of the other eight annas share; that on his death his daughter, Pheki Bibi, succeeded to this share, and that on her death her daughter, Fatima Bibi, succeeded to the same. It was further alleged that the mortgage-debt had been satisfied from the usufruct of the mortgaged property. The plaintiffs in the suit were Sadat Ali and Fatima Bibi. They claimed to recover the whole estate on the allegation that Ghisi Bibi, the proprietor of a four annas share of it, refused to join in the suit. The defendant Fakir Bakhsh set up as defence to the suit, amongst other things, that the mortgage-debt had not been satisfied from the usufruct of the mortgaged property; that Bandhu had not sold his four annas share to the plaintiff Sadat Ali, but to Sadat Ali and one Amat-un-nissa Bibi jointly in equal shares; that the latter had sold her moiety to Ghisi Bibi; and that consequently Sadat Ali was not competent to claim alone that four annas share. Subsequently, on the application of the

* Second Appeal No. 433 of 1884, from a decree of M. S. Howell, Esq., District Judge of Allahabad, dated the 4th January, 1884, modifying a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 25th June, 1883.

plaintiff Sadat Ali, Ghisi Bibi was added as a defendant to the suit. She filed a written statement, in which she claimed to be proprietor of a nine annas share of the estate. She alleged that Barkat Ali had sold her not only his ancestral share of four annas, but three annas more which he had acquired out of the eight annas share of Muhammad Ali. This three annas, she alleged, was acquired in this way:—Pheki Bibi predecased her father Muhammad Ali, and on the latter's death two annas of his eight annas share devolved upon his widow, three annas upon Barkat Ali, and three annas upon Bandhu. She further alleged that Amat-un-nissa Bibi had sold to her two annas of the four annas share which Bandhu had sold to Amat-un-nissa Bibi and Sadat Ali.

The Court of first instance found that the mortgage-debt had been satisfied from the usufruct of the mortgaged property, and that Sadat Ali's share was two annas and Fatima Bibi's eight annas; and, holding that they were only entitled to recover their own shares, gave them a decree for a ten annas share of the estate.

Both the defendants appealed, contesting Fatima Bibi's right to eight annas. Fakir Bakhsh also contested the finding of the Court of first instance that the mortgage-debt had been satisfied from the usufruct of the mortgaged property. The plaintiff Sadat Ali preferred an objection to that part of the decree of the Court of first instance which reduced the share claimed by him to two annas.

The lower appellate Court held that it was not necessary to determine in this suit the question as to what the shares of the representatives of the mortgagors were, and Ghisi Bibi should therefore not have been made a defendant to the suit, because the plaintiffs were admittedly representatives of the mortgagors, and were consequently entitled to redeem the whole estate, leaving it to the other representatives to recover their shares from them. The Court accordingly, affirming the decision of the first Court as to the satisfaction of the mortgage-debt, made a decree dismissing Ghisi Bibi from the suit and giving the plaintiffs possession of the whole estate.

The defendant Fakir Bakhsh appealed to the High Court, contending that the plaintiffs were only entitled to possession of their own shares.

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FAKIR BAKHSH v. SADAT ALI.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the appellant.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

OLDFIELD, J.—The plaintiffs are some of several co-mortgagors, and sue to redeem the entire property mortgaged, on the ground that the mortgage-debt has been satisfied out of the usufruct. The Courts below have decreed the claim. The only point taken in appeal by the mortgagee in this appeal, and by one of the co-mortgagors who had been made a party to the suit as a defendant, is that the plaintiffs can only obtain possession of their shares of the property.

It appears to us that this contention has force. The debt having been satisfied from the usufruct, the plaintiffs can only claim their own shares, and the Court below should determine the extent of the shares after making the other co-mortgagors parties.

The case is remanded in order that the issue be tried. Ten days will be allowed for objections.

Issues remitted.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885 *February* 24.

SHAHI RAM (PLAINTIFF) *v.* SHIB LAL (DEFENDANT). *

Suit for refund of proceeds of execution-sale—Small Cause Court Suit—Mortgage—First and second mortgagees—Registered and unregistered mortgages—Act III. of 1877 (*Registration Act*), *s.* 50—*Civil Procedure Code, s.* 295.

S and *L* held mortgage-bonds executed in their favour by the same person. *S's* bond was dated the 16th June, 1882, and was registered, the registration being compulsory. *L's* bond was of prior date, the 30th December, 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May, 1883, notwithstanding that *S* claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument, and therefore entitled

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* Second Appeal No. 343 of 1884, from a decree of J. L. Denniston Esq., Officiating District Judge of Moradabad, dated the 9th January, 1884, affirming a decree of Maulvi Muhammad Ezid Bakhsh, Munsif of Moradabad City, dated the 31st August, 1883.

to priority. *S*, being dissatisfied with this order, brought a suit to recover from *L* the moiety of the sale-proceeds paid to him.

Held that the suit being one to compel the defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him, was expressly allowed to be brought under the provisions of the penultimate paragraph of s. 295 of the Civil Procedure Code, and could not be regarded as a suit of the nature cognizable in a Court of Small Causes.

Held also that the registered bond of the plaintiff took effect as regards the property comprised in it against the defendant's unregistered bond, under s. 50 of the Registration Act (III of 1877), which gave priority to the incumbrance created by the former bond over the incumbrance created by the latter, and this priority was not affected by the subsequent decrees obtained on the bonds, which only gave effect to the respective rights under the bonds.

The meaning of s. 295 of the Civil Procedure Code is that when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority.

THE plaintiff and the defendant in this suit were simple mortgagees of the same property, the defendant being the prior mortgagee. The plaintiff's deed of mortgage, dated the 16th June, 1882, was registered, the registration being compulsory. The defendant's deed, dated the 30th December, 1880, was not registered, its registration being optional. Both parties instituted suits for the sale of the mortgaged property, and on the same day obtained decrees for its sale. The plaintiff applied on the 9th August, 1882, for the attachment and sale of the property, and the defendant made a similar application on the 12th August. The property was attached in execution of both decrees on the 14th August. On the 28th February, 1883, the property was sold in execution of both decrees. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May, 1883, notwithstanding that the plaintiff claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument and therefore entitled to priority. The plaintiff being dissatisfied with this order, brought the present suit to recover from the defendant the moiety of the sale-proceeds paid to him, amounting to Rs. 52-8. The Court of first instance held that, after decrees had been obtained on the deeds of mortgage, the question of priority with reference to registration and non-registration of the deeds was no longer relevant, and dismissed the suit.

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SHAHI RAM v. SHIB LAL.

On appeal by the plaintiff, the lower appellate Court affirmed the decree of the first Court, observing as follows:—" The case of *Parshadi Lal* v. *Khushal Rai* (1) is decisive. The appeal is dismissed with costs." The plaintiff appealed to the High Court, contending that as both the mortgage-deeds were executed after Act III of 1877 came into force, the lower Courts had improperly refused to go behind the decrees.

Babu *Ratan Chand*, for the appellant.

Pandit *Bishambar Nath*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J. (After stating the facts continued):—A preliminary objection has been taken that no appeal lies, as the suit is of the nature of one cognizable by a Court of Small Causes. This objection fails. The suit is brought to compel defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him. This is a suit expressly allowed to be brought in a Civil Court under the provisions of the penultimate paragraph of s. 295, and cannot be regarded as one of those cognizable by a Court of Small Causes.

With regard to the appeal, it appears that the plaintiff and the defendant hold mortgage-bonds executed in their favour by the same person. The plaintiff's bond is dated the 16th June, 1882, and is registered, the registration being compulsory. The defendant's is of prior date, the 30th December, 1880, but unregistered, the registration being optional.

Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property mortgaged, the decrees being made on the same day. The plaintiff took out execution, and applied for attachment and sale of the property on the 9th August, 1882, and the defendant did likewise on the 12th August, and attachment was made of the property on the 14th August, 1882, apparently on both applications.

The property was sold in satisfaction of both decrees on the 28th February, 1883, and bought by plaintiff, who deposited the sale-price;

(1) Weekly Notes, 1882, p. 15.

and he claims the right to the assets of the sale to satisfy his decree before any can be taken by the defendant, on the ground that his incumbrance has preference over defendant's under his registered bond, under the provisions of s. 50 of the present Registration Act, which governs the deeds in this case.

Now there is no doubt in my mind that the registered bond of the plaintiff takes effect as regards the property comprised in it against the defendant's unregistered bond under s. 50. This gives priority to the incumbrance created over the incumbrance created by defendant's bond; and this priority is not affected by the subsequent decrees obtained on the bonds, which only give effect to the respective rights under the bonds.

We have then here attachments and a sale of property in execution of two decrees, which ordered the sale of the property for the discharge of incumbrances thereon—a state of things which is provided for by s. 295, Civil Procedure Code, which contemplates the application of the sale-proceeds according to priority of incumbrances. The 3rd proviso to s. 295 is as follows:—"When immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance there on, the proceeds of sale shall be applied—*first*, in defraying the expenses of the sale; *secondly*, in discharging the interest and principal money due on the incumbrance; *thrdly*, in discharging the interest and principal moneys due on subsequent incumbrances (if any); and *fourthly*, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof." The meaning of the section is obvious, that when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority. On this view the plaintiff is entitled to have the money due on his incumbrance first discharged, and the appeal prevails, and the decrees of the lower Courts are set aside, and the claim is decreed with all costs.

Appeal allowed.

1885
February 25.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

LACHMAN (JUDGMENT-DEBTOR) *v.* THONDI RAM (DECREE-HOLDER).

Execution of decree—Limitation—Transmission of decree for execution—Application for execution of attached decree—"Step in aid of execution"—Act XV of 1877 *(Limitation Act), sch.* ii, *No.* 179 *(4)—Civil Procedure Code, ss.* 223, 228, 273.

A decree was passed on the 20th February, 1878, by the Munsif of *M*. In November, 1878, it was, in accordance with the provisions of s. 223 of the Civil Procedure Code, transferred to the Munsif of *J*. On the 21st January, 1879, an application for execution of the decree was made to the Munsif of *J*, who thereupon issued an order for the attachment of some immoveable property belonging to the judgment-debtor and also for the attachment of three decrees standing in his Court in favour of the judgment-debtor against other persons. On the 18th March, 1882, the decree holder applied to the Munsif of *J* to execute one of these decrees in his behalf, and he further asked that whatever might be realized in such execution should go to the account of the decree which had been transferred, and which was being executed.

Held that the application of the 18th March, 1882, was perfectly legal, and such a proceeding as could keep alive the decree of the 20th February, 1878, and that a subsequent application for execution dated the 12th April, 1883, was therefore not barred by limitation.

An application to execute an attached decree is a "step in aid of execution" of the original decree, within the meaning of art. 179, sch. ii of the Limitation Act, inasmuch as its object is to obtain money in order to pay off the judgment-debtor.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Mr. *Amiruddin*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The Court (PETHERAM, C. J., and STRAIGHT, J.) delivered the following judgments:—

PETHERAM, C. J.—I think that this appeal must be dismissed with costs, and for the purposes of my judgment, I propose only to state the view which I take in connection with art. 179 of the Limitation Act. My brother Straight will deal with the facts of the case, and with the procedure which has been followed.

The question as to art. 179 is whether an application to execute an attached decree is a "step in aid of execution" of the original

* Second Appeal No. 41 of 1884, from an order of Babu Abinash Chandar Banarji, Subordinate Judge of Agra, dated the 10th February, 1884, reversing an order of Maulvi Nazar Ali, Munsif of Mahaban, dated the 28th July, 1883.

decree. It appears to me that an application for execution of a money-decree means an application to the Court to get the money by sale of property belonging to the judgment-debtor, so that the Court may be able to pay the creditor the amount due to him. In the present case such an application was made by the judgment-creditor, and the Court then took the first step in aid of the execution of the decree by attaching the debtor's property, and the property so attached included a judgment-debt. That judgment-debt had to be sold or realized in some way, and it could only be done by applying to the Court in which the judgment was to execute it by selling the debtor's property. It would then be necessary to make an application to the Court executing the original decree to bring the amount so received into account, and that is what was done in the present case. If I am right in the view which I take of execution of decree, this must be "a step in aid of execution" within the meaning of art. 179 of the Limitation Act, because the object of it was to obtain money in order to pay off the judgment-debt; and it was in execution for that reason. I am therefore of opinion that the order of the lower appellate Court was right, and that the appeal must be dismissed with costs.

STRAIGHT, J.—It will be convenient, in reference to what the Chief Justice has said, that I should illustrate his observations by describing the circumstances of the case. The decree now in question was passed on the 20th February, 1878, and it was passed by the Munsif of Muthra. On the 21st November, 1878, an application was put in for the transfer of the decree to the Munsif of Jalesar, and, in accordance with the provisions of s. 223 of the Civil Procedure Code, it was transferred to him, and he then became seized of it, and, under s. 228 of the Civil Procedure Code, acquired thereupon the same powers in regard to its execution as if he had himself passed it. On the 21st January, 1879, the application for execution proper, so to speak, was made to the Munsif of Jalesar, who seems to have issued an order for the attachment of some immoveable property belonging to the judgment-debtor, as also for attachment of three decrees standing in his Court in favour of the judgment-debtor against other persons. Two at least of these decrees related to immoveable property. On the 18th March, 1882, a formal application was made by the decree-holder, the res-

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pondent in the present appeal, to the Munsif of Jalesar to execute one of these decrees on his behalf; and he further asked that whatever might be realized in such execution should go to the account of the decree which had been transferred, and which was being executed. We are now invited by the learned counsel for the appellant to hold that a subsequent application for execution of the decree, dated the 12th April, 1883, was barred by limitation. He contends that the application of the 18th March, 1882, was not such a proceeding as could keep alive the decree of the 20th February, 1878. I am wholly unable to accept this contention. Under s. 228 of the Code, the decree having been transferred to the Munsif of Jalesar, he had, in executing it, the same powers as if he had himself passed it; and any order passed by him under s. 273 would be made under the first paragraph of that section, because it would be an order directing the proceeds of the former decree to be applied in satisfaction of the latter decree. I cannot see what other course the judgment-creditor could have adopted than that which he actually took. It appears to me that the application of the 18th March, 1882, was perfectly in order and perfectly legal, and I therefore hold that the application of the 12th April, 1883, was not barred by limitation, and the appeal should be dismissed with costs. I may add that I entirely concur with the Chief Justice in the construction which he puts upon the terms used in the third column of art. 179 of the Limitation Act.

Appeal dismissed.

1885 *February* 27.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

UMRAI AND OTHERS (DEFENDANTS) *v.* RAM LAL AND OTHERS (PLAINTIFFS) *

Suit for share of compensation awarded for land acquired for public purposes—Suit for money had and received for plaintiff's use—Small Cause Court suit.

A suit was brought by some of the co sharers in a patti of a mahal in which land had been taken for public purposes under the Land Acquisition Act, against the other co-sharers in the patti for the proportion due to them out of a sum of money which had been awarded as compensation for the acquisition of the land, and which the defendants had received.

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* Second Appeal No. 487 of 1884, from a decree of Rai Pandit Jagat Narain, Subordinate Judge of Furakhabad, dated the 12th February, 1884, reversing a decree of Maulvi Muhammad Anwar Husain, Munsif of Kaimganj, dated the 1st September 1883.

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Held that the suit was one for money had and received for the plaintiff's use, and was therefore cognizable by a Court of Small Causes. *Sohan* v. *Mathura Das* (1) followed.

THE parties to this suit were co-sharers in a patti of a mahal, Certain land in this patti had been taken for public purposes under the Land Acquisition Act. A sum of Rs 29-1-4 had been awarded as compensation for the acquisition of the land. This sum had been received by the appellant Umrai, one of the co-sharers. The respondents, asserting that they were entitled to receive Rs. 10-14-6 out of the compensation awarded, that sum representing proportionately the extent of their interest in the land, sued the appellants, the other co-sharers in the patti, for the same. In this second appeal in the suit, it was contended by the respondents that a second appeal would not lie, as the suit was one of the nature cognizable in a Mufassal Court of Small Causes.

Lala *Lalta Prasad*, for the appellants

Munshi *Hanuman Prasad*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—A preliminary objection has been taken that the appeal will not lie, as the suit is of the nature of a suit cognizable by a Court of Small Causes. We are of opinion that the objection is valid. The suit is for money had and received for the plaintiff's use, and following the decision of this Court in *Sohan* v. *Mathura Das* (1), we hold such a suit to be cognizable by a Court of Small Causes. The appeal is dismissed with costs.

Appeal dismissed.

FULL BENCH.

1885
February 27.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr Justice Mahmood.

QUEEN-EMPRESS *v.* ABDULLAH.

Statement as to cause of death—Cause of death signified in answer to question—Admissibility of evidence as to signs—Act I of 1872 (*Evidence Act*), *s.* 3 *s.* 8, *Explanations* 1, 2, *ss.* 9, 32 (1)—"*Fact*"—"*Conduct*"—"*Verbal*" *statement.*

In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances

(1) I. L. R., 6 All. 449.

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in which the injuries had been inflicted on her, that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions.

Held by the Full Bench (MAHMOOD, J, dissenting) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act, and were therefore admissible in evidence under that section.

Per STRAIGHT J., that statements by the witnesses as to their impressions of what the signs meant were inadmissible, and should be eliminated; but that assuming that the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, it was not straining the construction to hold that the circumstances were covered by s. 32.

Per MAHMOOD, J., that the expression "verbal statements" in s. 32 should be confined to statements made by means of a word or words, and that the signs made by the deceased, not being verbal statements in this sense, were not admissible in evidence under that section.

Per PETHERAM, C. J., that the signs could not be proved as "conduct" within the meaning of s. 8 of the Evidence Act, inasmuch as, taken alone, and without reference to the questions leading to them, there was nothing to connect them with the cause of death, and so to make them relevant; while the questions could not be proved either under *Explanation* 2 of s. 8, or under s. 9, inasmuch as the condition precedent to their admissibility under either of these provisions was the relevancy of the conduct which they were alleged to affect or of the facts which they were intended to explain. The "conduct" made relevant by s. 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons.

Per MAHMOOD, J., that the word "conduct" as used in s. 8 does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact; that the signs made by the deceased were the conduct of "a person an offenee against whom was the subject of any proceeding" and were relevant as such under s. 8; and that the questions put to her were admissible in evidence either under *Explanation* 2 of the same section, or under s. 9, by way of an explanation of the meaning of the signs.

THIS was an appeal from an order of Mr. R. H. S. Aikman, Officiating Sessions Judge of Aligarh, dated the 24th December, 1884, convicting the appellant of murder. The appellant, Abdullah, son of Chhote, was charged before the Court of Session with the murder of one Dulari, a prostitute, by cutting her throat with a razor. It appeared that on the morning of the 27th September, 1884, Dulari, with her throat cut, was taken to the police-station, and thence to the dispensary. She lived till the morning of the 29th. The *post mortem* examination showed that the windpipe and the anterior

wall of the gullet had been cut through. The deceased had also a cut on the left thumb. When she was taken to the police-station, she was questioned by her mother, Chunna Jan, in presence of the Kotwal (sub-inspector of police), Ghulam Ali. She was also at the same time questioned by the Kotwal and again, subsequently, by Munshi Behari Lal, Deputy Magistrate, and Babu Mulraj, Assistant Surgeon. She was unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution to prove the questions put to Dulari, and the signs which she made in answer to such questions. Objection was taken to the reception of this evidence, on the ground that, under s. 32 of the Evidence Act, only written or verbal statements made by a deceased person as to the cause of his death were admissible, and that signs were not "verbal" within the meaning of that section. The Sessions Judge overruled this objection, and allowed the evidence to be given. That evidence was as follows:—

Chunna Jan stated:—"The same day, in the evening, the Deputy Magistrate came to the dispensary. He asked her, Dulari, who had wounded her. She closed her lips so. Then the Deputy Magistrate mentioned a great many names to her until the name of Abdullah was mentioned, when she nodded her head and said '*hán*' (yes) in a low voice. He asked her what he had wounded her with, and she raised her finger as she had done before. He asked her if she had been wounded with a razor, and she nodded her head. He asked her how she had seen the razor. She pointed to her throat, and showed a wound on the finger of her left hand. He asked her if a lamp was burning. She made a sign with her hand that there had been no lamp. He asked her how she had seen if there had been no light, and she pointed and looked up at the sky as if to indicate that it was morning. The next morning the Kotwal came to the dispensary with a man whom I recognized as the man who had come to fetch her. The Kotwal in my presence asked her if that was the man who had killed her, and she made a sign that it was not. He asked her whether this was the man who had taken her away, and she made a sign that it was. I repeatedly asked her who had wounded her, and she always made signs that it was Abdullah."

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Ghulam Ali Khan stated:—"Dulari was unable to speak. I asked her who had cut her throat. She could not speak. Then her mother asked if the *sipahi* had cut her throat. She remained quiet. (Then said) She made a negative sign with her hand. Her mother asked whether the Munshi had cut her throat She again made a negative sign with her hand. After mentioning two or three other names, to all of which she made the same sign, the mother mentioned Abdullah's name. Then she made an affirmative sign with both hands, thus (showing the manner in which deceased moved her hands). When I asked which Abdullah, the mother said it was a *Bhatiyara*, a shoe-seller. She only mentioned Abdullah's name without describing him as a shoe-seller when she questioned her daughter. When I asked her what he had cut her throat with, she lifted her fore-finger so. I understood her to mean a pocket-knife."

Munshi Behari Lal stated:—"On the 27th September last, between 7 and 8 P.M., I went to the Koil dispensary to take the deposition of a woman named Dulari. I found her unable to speak. The woman now in Court, Chunna Jan, was with her. The eyes of Dulari were shut, but she opened them when I called out to her. The Assistant Surgeon and her mother, Chunna Jan, said that though she could not speak, she could make signs. I mentioned several names,—*i.e.*, Ismail, Akbar Khan, Akbar Husain, Khuda Bakhsh, and asked regarding them one by one if they had wounded her. Dulari was unable to lift her hand, but her mother raised her (*i. e.* Dulari's) forearm, holding it below the elbow. When her arm was raised, Dulari was able to move her hand from the wrist, and when the above names were mentioned to her, she waved her hand backwards and forwards, thus making a negative sign. Some of the above names were told me by Chunna Jan, and some I mentioned at hap-hazard. I then, at Chunna Jan's instigation, asked her if Abdullah had wounded her. On this she moved her hand up and down. I understood this to be a sign of affirmation. I only mentioned the name Abdullah; did not mention his parentage, caste, or trade. I then asked her if he had wounded her with a sword or knife. She made a negative sign with her hand. I then asked her if he had wounded her with a razor. She, in answer to this, made an affirmative sign

with her hand. I asked her if she had been awake when he cut her throat. She made a negative sign. I asked her if she had been asleep at the time. She made an affirmative sign. I asked her if she had been wounded during the night. She made a negative sign. I then asked her if she had been wounded towards morning (*subah hote*). She made the affirmative sign to this. I asked her if she had recognised Abdullah. To this she made the affirmative sign. I asked her if any other man save Abdullah had been present when her throat was cut. To this she made the negative sign. The Assistant Surgeon was present during the time I examined Dulari. Chunna Jan was supporting Dulari's arm all the time, holding it close to the elbow. Dulari moved her hand herself from the wrist, the motion was not communicated to her hand by Chunna Jan moving her arm. Dulari's eyes were generally open during the examination, but she may have shut them from time to time: she seemed to me to be under 20 and over 15 years of age. I was with her between 15 minutes and half an hour. From her making signs of affirmation and negation, I am of opinion that she understood the questions I put to her."

Babu Mulraj stated:—"When she was questioned at first, she endeavoured to nod her head, and did nod it several times, but I forbade her doing so, as it was prejudicial to the wound. I told her when she wished to express a negative, to move her hand backwards and forwards, the usual mode of expressing a negative; and when she wished to express an affirmative, to move her hand up and down, thus (witness here indicated the gesture indicated by the Deputy Magistrate as the mode in which deceased expressed an affirmative). I think the Deputy Magistrate came on the evening of the 28th. I was present when the deceased was examined by the Deputy Magistrate. I heard the Deputy Magistrate ask her about the man who killed her, and I saw her make the affirmative sign. She made the affirmative sign at the mention of the name of Abdullah. I do not remember now whether I saw her make a negative gesture to any question put by the Deputy Magistrate. She was conscious, but weak, when the Deputy Magistrate questioned her. I think when the Deputy Magistrate questioned her, she tried to nod her head and I forbade, and told her to make signs with her hand. I do not remember whether she

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lifted her arm herself or whether any one supported her arm, but she was not at that time so weak as not to be able to lift her arm. In my opinion she was able to understand questions put to her when the Deputy Magistrate questioned her. I do not remember whether any other official save the Deputy Magistrate questioned her in my presence. I several times questioned her as to how she came to be wounded. I mentioned several names to her, and asked her regarding them whether any one of them had killed her. To all she made the negative sign. When I asked her whether it was Abdullah who had wounded her, she made the affirmative sign. I do not know what Abdullah was referred to. I questioned Dulari regarding him from hearing what the mother said. After hearing from her mother what Abdullah it was,--*i. e*, whose son he was, and that he was a shoe-seller, I asked Dulari specifically whether it was Abdullah, the son of such a one, the seller of shoes, who had wounded her, and she made the affirmative sign. I do not remember whose son Chunna Jan said Abdullah was, but she mentioned Abdullah's father's name. I also questioned her about the time at which the wound was inflicted. I asked her whether she had been wounded at the time she went to the house. She made a negative sign to this. I asked her whether it was towards dawn, and she made an affirmative sign. I also asked her what she had been wounded with. I think she made an affirmative sign at the mention of a razor. From what I heard, I asked whether Abdullah had taken her into his father's house. To this question she made an affirmative sign. I asked her whether any one along with Abdullah had killed her, and she made a negative sign."

In overruling the objection to this evidence, the Sessions Judge observed as follows:—

"I do not think the section means that the statements must either be written by the deceased or uttered by the deceased in an audible voice. Evidence given by a dumb witness, or a witness unable to speak, by the medium of signs, is, according to the provisions of s. 119 of the Evidence Act, deemed to be oral evidence. And in like manner, in a case like the present, if deceased was able to convey her meaning by means of signs, I think her statement is to be considered as a 'verbal' statement, although she herself was

unable to put it into words. I accordingly held that the witnesses might give evidence as to the signs they saw deceased make when questions were put to her. From the evidence of these four witnesses it appears that the deceased, when questioned as to whether the Munshi, the *sipahi* (*i.e.*, the pretended tahsil *chaprasi*), and others who were mentioned by name had cut her throat, made to all the ordinary negative sign used by the natives of this country (this is made by moving from right to left and from left to right the open hand held perpendicularly with the palm turned away from the body), but that when the name of Abdullah was mentioned, she made a different sign by moving the hand up and down. This gesture can be best described by saying that she 'nodded' with her hand if one may be allowed the expression. The Assistant Surgeon states that she endeavoured to, and did more than once, nod her head, but that he forbade her doing so, as it was hurtful to the wound, and instructed her to use the signs of assent and dissent indicated above. The Deputy Magistrate, who visited her on the evening of the 27th, states that from her making signs of affirmation and negation he is of opinion that she understood the questions that were put to her. The Civil Surgeon states that she remained conscious up to the 28th, and the Assistant Surgeon, in whose immediate charge she was, says that she remained conscious until shortly before she died,—*i.e.*, the morning of the 29th. None of the larger blood-vessels were injured, and the wound itself was not one which would directly affect the brain. I think, then, that there is no reason to doubt that the deceased, when questioned by these four witnesses, understood what was said to her. I think it is clear from the evidence of these four witnesses that the deceased intended to charge, and did charge the accused, Abdullah, with having cut her throat. In answer to these witnesses, she indicated that she had been attacked towards the morning while she was asleep, and that her throat had been cut with a razor. She indicated to the Assistant Surgeon that it was the accused Abdullah who had taken her from the *baithak* into the adjoining house. The cut on her thumb appears to indicate that she offered resistance. I think, therefore, that though she may have been asleep when first attacked, she had the opportunity of recognizing her murderer, whoever he was. On learning that Abdullah was charged, the sub-

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inspector caused a search to be made for him in all directions, but it was not until the evening of the 29th September,—*i. e.*, after Dulari was dead,—that he was arrested. He could not therefore be confronted with the deceased, but I think there can be no reasonable doubt that it was the Abdullah in Court whom she mean to accuse of her murder."

It was contended for the appellant that the evidence which has been set out above was improperly received.

With reference to this contention, the Divisional Bench (Petheram, C. J., and Mahmood, J.) hearing the appeal referred the following question to the Full Bench:—"Whether, under the circumstances of this case, the evidence of the witnesses to prove the impression created on their minds by signs made by the deceased, was admissible, as forming a statement made by her or otherwise?"

Mr. *G. E. A. Ross* and Mr. *C. Dillon*, for the appellant.

Mr. *C. H. Hill* (*Public Prosecutor*), for the Crown.

The *Public Prosecutor* (Mr. *Hill*), for the Crown, contended that the signs made by the deceased were the "conduct" of a "person, an offence against whom was the object of any proceeding," and such conduct "was influenced by" the cutting of her throat by the prisoner, which was a fact in issue. They were therefore admissible in evidence under s. 8 of the Evidence Act, and, that being so, the questions also in answer to which they were made were admissible under *Explanation* 2 of the same section, and also under s. 9. They might also properly be regarded as amounting to a dying declaration under s. 32. Without contending that the signs taken alone amounted to a verbal statement, they at least signified an assent to or adoption of the verbal statements implied by the questions, and therefore, taken in conjunction with such questions, should be treated as "verbal statements." In England it has been held that no continuous statement by a dying person is necessary to constitute a dying declaration, and that such a declaration is sufficiently made by answers to leading questions. In such a case, the statements implied by the questions would be treated as having been made by the person giving his assent, though it might be that not one word of such statements was

uttered by himself. In *Regina* v. *Steele* (1) it was decided that a statement made by a deceased person, under circumstances which would not render it admissible as a dying declaration, becomes admissible if repeated in his presence and at his request by the person to whom it was previously made, and if assented to by the deceased (presuming that he is than in such a state that, if he had made a statement, it would have been admissible as an dying declaration).

Mr. *G. E. A. Ross*, for the appellant.—The signs cannot be regarded as "conduct" within the meaning of s. 8 of the Evidence Act, because, in the first place, assuming them to amount to "statements," (which was the highest point at which the prosecution can put them,) *Explanaton* 1 shows that they are not admissible, since they did not "accompany and explain acts other than statements." Further, the condition precedent to their admissibility as "conduct" is that they should "influence or be influenced by any fact in issue or relevant fact," and "influence" cannot be construed so loosely as to include everything which remotely affects conduct: it must be confined to direct and immediate causes. The signs here used were not the direct and natural result of the fact in issue, *i.e.*, the murder, for they were the result of the questions put to the deceased. The prosecution are in fact attempting to make out that the signs were "conduct" and also to bring them in as "statements." In regard to s. 32, the provisions of the Act must, according to recognized principles, be construed strictly, and the prisoner is entitled to the benefit of such construction. In this view, the signs cannot be taken to be "verbal statements." In regard to the argument that they were an adoption of the statements contained in the questions, it would be unsafe to act upon such a principle in this country, though it might be safe and reasonable in England. The admission of such a class of evidence would be dangerous in the highest degree, considering its necessarily indefinite character, and its consequent liability to misapprehension and perversion. S. 119 of the Evidence Act indicates that the Legislature intended the admission of such signs to be subject to the condition of being made in open Court, so that the Court trying the case may be in a position to test their mean-

(1) 12 Cox. Cr. Cas. 168.

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ing for itself, instead of depending upon the unverified impressions of others.

The following judgments were deliverd by the Full Bench:—

PETHERAM, C J.—I understand the question submitted to us by the reference to come to this. When a witness is called who deposes to having put certain questions to a person, the cause of whose death is the subject-matter of the trial, which questions have been responded to by certain signs, can such questions and signs, taken together, be properly regarded as "verbal statements" under s. 32 of the Evidence Act, or are they admissible under any other sections of the same Act?

I propose to deal first with the other sections to which reference has been made. It is contended that the questions which were put to the deceased, and the responses which she made to those questions, are "facts" within the purview of ss. 3 and 9. I do not, however, concur in this view. It appears to me that a fact must be proved to be relevant before another fact can be proved to explain its meaning; and since, without *words* being used, the signs could not be proved to be relevant, the words themselves are also not relevant.

The next question is, whether mere signs can be regarded as "conduct" within the meaning of s. 8. Upon this point it must be remembered that the 2nd paragraph of that section makes relevant the conduct of any person who is a party to any suit or proceeding "in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto." And of course the conduct of a party interested in any proceeding at the time when the facts occurred out of which the proceeding arises, is extremely relevant, and therefore any conduct on the part of the deceased in this case, which had any bearing on the circumstances in which she met her death, would be relevant. But the state of things is this. She, being in a dying state at the hospital, made, in the presence of certain persons, the signs which have been referred to. It is clear that, taking these signs *alone*, there is nothing to show that they are relevant, because there is nothing which connects them with the cause of death. Then it is argued that since conduct is relevant under certain circumstances, you may,

with reference to *Explanation* 2 of s. 8, prove any statements made to the person whose conduct is in question. In order to decide this point the language of s. 8 must be carefully considered. It is to the following effect :—"The conduct of any party or of any agent to any party to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. *Explanation* 1.—The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act. *Explanation* 2 —When the conduct of any person is relevant, any statement made to him or in his presence or hearing, which affects such conduct, is relevant." Now the question here in issue is—Did Abdullah kill the deceased by cutting her throat? The only conduct which is alleged on the part of the deceased is, that she moved her hand in answer to questions put to her by some of the persons at the hospital. If we went no further than this, there would be nothing to show that her conduct in lifting her hand either influenced or was influenced by the fact in issue,—*i. e.*, the cutting of her throat. Then *Explanation* 2 is brought in ; but it is obvious that before you can let in the words of a third person, you must show that the conduct which they are alleged to affect is relevant. And in the present case it is clear that *until* you let in the words, the conduct is not relevant, and therefore the words cannot be let in because the condition precedent to their admissibility has not been satisfied, and that not having been done, their whole basis fails.

Explanation 1 of s. 8 points to a case in which a person whose conduct is in dispute mixes up together actions and statements ; and in such a case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here what the injured person says and what he does may be taken

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together and proved as a whole. But the case would be very different if some passer-by stopped him and suggested some name, or asked some question regarding the transaction. If a person were found making such statements without any question first being asked, then his statements might be regarded as a part of his conduct. But where the statement is made merely in response to some question or suggestion, it shows a state of things introduced, not by the fact in issue, but by the interposition of some thing else. For these reasons I think that the signs made by the deceased cannot be admitted by way of "conduct" under s. 8 of the Evidence Act.

I now turn to the other part of the argument,—that which relates to s. 32.

In the first place, it is clear that s. 32 was intended by the framers of the Act to provide for cases of "dying declarations;" that is to say, where a person mortally injured makes certain statements regarding the cause and other circumstances of the injury, and then dies. These statements may be given in evidence under s. 32. If I had been compelled to hold that these signs were not admissible under s. 32, I should have regretted it, because I feel that they are admissible under s. 32 or not at all. I think that the Legislature intended that such evidence should be admitted only within the limits provided by that section, and that if they cannot be brought under that, we ought not to search too carefully for other provisions under which to admit them. The statement, assuming it to be such, was here made by a witness, that is, by one who was conscious, and who knew the truth, and whose evidence would have been the best possible if she had continued to live. The only question would then have been as to the truth of her evidence. Of her competency to speak the truth of the matter, there could, of course, be no doubt. But she is dead, and cannot be called as a witness, and the question then arises whether you can, as it were, make her a witness notwithstanding her death, and give in evidence the statements which she made. To make such a state of things possible, s. 32 of the Evidence Act was passed. That section says that the statement, whether written or verbal, must be a statement as to relevant facts. In the present case that condition is of course satisfied.

The question then arises—Is the statement a "verbal" one? "Verbal" means by words. It is not necessary that the words should be spoken. If the term used in the section were "oral," it might be that the statement must be confined to words spoken by the mouth. But the meaning of "verbal" is something wider. From the earliest times it has been held that the words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself. The same objection which is now made to the admission in evidence of these signs might equally be made to the assent given by a witness in an action to leading questions put by counsel. If, for example, counsel were to ask—"Is this place a thousand miles from Calcutta?" and the witness replied "Yes," it might be said that the witness made no statement as to the distance referred to. The objection to leading questions is not that they are absolutely illegal, but only that they are unfair. The only question here is, whether the deceased, by the signs of assent which she made, adopted the verbal statements employed by the questions? I think it must be held that she did so. I have felt some difficulty in arriving at this conclusion, because it is plain that evidence of this description requires strong safeguards before it can properly be accepted. But since the deceased might undoubtedly have adopted the words of the Deputy Magistrate by express words, such as "Yes," though even in that case the words in which the statement was actually made would not have been her own, I think she might equally adopt them by signs also. On these grounds, I would answer the reference in the amended form, which I indicated at the outset, in the affirmative.

STRAIGHT, J.—I also am of opinion that the signs made by the deceased Dulari, in response to the questions put to her, may be given in evidence, with the object of supplying material from which the inference may properly be drawn, that she either adopted or negatived the matter of such questions. If the significance of these signs is established satisfactorily to the mind of the Court, then I think that such questions, taken with her assent or dissent to them, clearly proved, constitute a "verbal statement" as to the cause of her death, within the meaning of s. 32 of the Evidence

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Act. Statements by the witnesses as to their impressions of what those signs meant were, in my judgment, inadmissible, and should be eliminated; but, assuming that the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, then I consider it is not straining the construction to hold that the circumstances are covered by s. 32. It has been held more than once in England that it is no objection to the admissibility of a dying declaration that it was made "in answer to leading questions or obtained by earnest and pressing solicitations."—(Russell *On Crimes*, vol. 3, p. 269); and I am not disposed, as we have remarked, to draw such a purely technical distinction as to say that while questions adopted or negatived by a mere "Yes" or "No" constitute a "verbal statement," within s. 32, they become inadmissible when assent or dissent is expressed by a nod or a shake of the head. In the view of the matter I have indicated, it is unnecessay to discuss s. 8 of the Evidence Act, and I would accordingly answer the question of the reference as now amended in the affirmative.

OLDFIELD, J.—I entirely concur in the answer given to the reference by the learned Chief Justice and in his reasons for that answer.

BRODHURST, J.—I alsa concur.

MAHMOOD, J.—I have arrived at the same conclusion as my learned brethren; but I am obliged to say that my reasons for doing so are not precisely the same. I should accept the view expressed by the learned Chief Justice, if we had not to interpret the language of the statute, and if I did not feel unable to extend the meaning of the term "verbal" in s. 32 of the Evidence Act beyond that of "a word." I take it to be a fundamental principle of the interpretation of statutes that their language must be understood in its most ordinary and popular acceptation. In such a matter, I would, in general, willingly defer to the opinions of those whose mother-tongue is English, but, sitting here as a Judge, I am bound to form the best opinion that I can, and to act on such opinion, and to me "verbal" cannot mean more than "by means of a word or words." Nodding the head or waving the

hand is not a word. I therefore put aside cl. (1) of s. 32, which can only apply to "statements written or verbal."

I proceed to explain my reasons for holding that nevertheless my answer to the present reference should be in the affirmative. In the first place, let me refer to s. 2 of the Evidence Act, which in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself. This is the opposite of the rule adopted in continental countries, such as France, where everything is admissible as evidence which the law does not expressly exclude. Our Act has followed the English rule, which is thus expressed in s. 5:—"Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others." The learned Public Prosecutor no doubt appreciated the importance of this provision, when he addressed us on what I think he must have regarded as the strongest part of his argument, I mean when he tried to show that the signs used by the deceased were admissible in evidence as part of the *res gestæ*, under the earlier sections of the Act to which he referred. Now s. 8 says:—"Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto." It will be useful to analyse the leading terms employed in this section. In the first place, what is a "fact?" This question is answered by s. 3, which defines "fact" to mean and include "any thing, state of things, or relation of things, capable of being perceived by the senses," and "any mental condition of which any person is conscious." This, then, is the only sense in which, in interpreting the statute, I can understand the word "fact." The next leading word in s. 8 is "party." I understand this to include not only the plaintiff and the defendant in a civil suit, but parties in a criminal prosecution, as, for instance, a prisoner charged with

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murder. S. 8 provides that the term is to include any one against whom an offence is the subject of any proceeding, and the reason why the Legislature said this was probably the fact that by a pure legal technicality the Crown occupies in criminal matters a position analogous to that of a plaintiff in a civil suit.

Let me now refer to *Illustration* (*f*) of s. 8, which runs thus :— "The question is, whether *A* robbed *B*. The facts that, after *B* was robbed, *C* said in *A's* presence—'the Police are coming to look for the man who robbed *B*,'—and that immediately afterwards *A* ran away, are relevant."

Now, if I were to hold that the word "conduct," as used in s. 8, meant only conduct *directly* resulting from the circumstances in which the crime was committed and without any intervening cause, I should be holding that this *Illustration* was at variance with the section which it was designed to explain. For although *A's* conduct is undoubtedly "influenced" by the fact in issue, it is only influenced through the intervention of a third person *C*. Hence I conclude that "conduct" does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact. The present case is the same in principle as that given in the *Illustration*. The deceased would not have acted as she did if it had not been for the action of those who questioned her. Nor do I see any difference in principle between the act of *A* in running away when told that the police were coming, and the act of the deceased in moving her hand in answer to the questions. Both equally seem to me to be cases of conduct within the meaning of s. 8.

The Evidence Act was principally the work of Sir James Stephen, one of the most eminent of European jurists. It appears to me that in several particulars his method of treating questions of evidence differs from that which is common among English lawyers. Under the English law, a dying declaration, even when consisting of words, would be admissible only as an exception to the general rule which exclude all but direct evidence. The principle of the Evidence Act is different. S. 60 provides that "oral evidence must, in all cases whatever, be direct;" that is to say, the evidence of the senses of the person who is called as a witness. This is, so far, only a repetition of the English Law. But an

ordinary English writer on the Law of Evidence would classify ss. 32 and 33 as exceptions or provisos to s. 60. The framers of the Evidence Act, on the other hand, regarded the facts referred to in those sections as independent *indicia* of truth, and furnishing in themselves direct grounds for legitimate inference.

For the reasons which I have given above, I hold that the signs made by the deceased were the conduct of a "person an offence against whom was the subject of any proceeding," and that they are therefore relevant under s. 8 of the Evidence Act. There remain the question, whether the questions put her were admissible, and whether she can be considered to have adopted the statements which they implied. Now, *Explanation* 2 to s. 8 provides that "when the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affect such conduct, is relevant." I confess that I am quite unable to hold that for "when" you must read "before." If you read the section as I do, the law stands thus. The conduct of the person an offence against whom is being investigated is relevant. The question whether it is intelligible or not arises afterwards, and the only way of ascertaining its meaning is to admit what *Explanation* 2 says may be admitted, namely, statements made to, or in the presence and hearing of, the person and which affect his conduct. This can only be done by taking the questions word for word, so as to explain the meaning of the conduct which they affected.

Finally, I may add that if s. 8, with the *Explanations* contained in it, were not sufficient to justify the view which I take of the question referred to the Full Bench, I should have relied on the provisions of s. 9, in order to allow an explanation of the meaning of the signs. In conclusion, I feel that, although what I may call the principle of exclusion adopted by the Evidence Act,—*i.e.*, the principle that all evidence should be excluded which the Act does not expressly authorise, is the safest guide in regard to the admissibility of evidence, yet it should not be so applied as to exclude matters which may be essential for the ascertainment of truth. Adopting an expression once used by Mr. Justice Story, I think that the Law of Evidence would not be worthy of its name if it made possible any such result. My answer to the reference is in the affirmative.

1885
February 27.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Mahmood.

RAM PRASAD RAI AND OTHERS (JUDGMENT-DEBTORS) *v.* RADHA PRASAD SINGH (DECREE-HOLDER)*.

Rules prescribed by Local Government under s. 320 of the Civil Procedure Code—Notification No. 671 of 1880, dated the 30th August, 1880—"Ancestral" property—Alluvial Land—"Ancestral" riparian property—Alluvial land held on same title as riparian land.

Held that the ownership of alluvial land which had accreted to a riparian village must rest upon the same title as that upon which the original village was held, and that as the riparian village was ancestral the accreted property must be ancestral also.

THE question raised by this appeal was whether certain land belonging to the appellants, which had been attached and proclaimed for sale in execution of a decree, was "ancestral property," within the meaning of the Rules prescribed by the Local Government under s. 320 of the Civil Procedure Code (Notification No. 671 of 1880, dated 30th August, 1880). This land, it appeared, was alluvial land which had accreted to a riparian village belonging to the appellants, which admittedly was "ancestral property" as defined in those Rules. The lower Court (District Judge) held that the land in question was not "ancestral property." It observed on this point as follows:—"Now it is not contended that there is anything to show that any or if so what area of such land was even above water prior to 1870. There were formal measurements then, but before such measurements nothing seems to have been on record, and there can be nothing to go upon. If the land was under water (as it may have been) till 1870, it will not come under the Notification. There does not seem to be anything in the old Regulation (worded without any thought of such Notification) which would justify us in treating the Notification as applicable to land rescued in or about 1870 from the river. The debtor contends that the land may have crossed the river from other villages of his,—not perhaps all in the area affected by the Notification. We need not follow out all these suppositions. It is enough that the land is not clearly ancestral."

* First Appeal No. 123 of 1884, from an order of J. L. Denniston, Esq., Offg. District Judge of Ghâzipur, dated the 5th July, 1884.

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RAM PRASAD RAI v. RADHA PRASAD.

For the appellants it was contended that the lower Court had improperly held that the alluvial land was not "ancestral property."

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

Mr. *T. Conlan* and Lala *Lalta Prasad*, for the respondent.

The Court (PETHERAM, C. J., and MAHMOOD, J.) delivered the following judgment :—

MAHMOOD, J.—The learned Chief Justice has asked me to explain the simple reasons for which we agree in thinking that this appeal should be decreed. The land to which the appeal relates is admitted to be alluvial land, to which the present appellants-judgment-debtors acquired a title by owning a riparian village, admitted to be ancestral property. The only question is, whether the ownership of the land so acquired rests upon a title other than that upon which the original village was held. Under such conditions, however, there can be no two titles; and, as the riparian village was ancestral, the other property must be ancestral too. This decision comes within several rulings of the Privy Council, to which I need not more particularly refer.

The appeal must be decreed with costs, and the Judge must deal with the property as ancestral property, with reference to s. 320 of the Civil Procedure Code.

Appeal allowed.

APPELLATE CRIMINAL.

1885
February 27.

Before Sir W. Comer Petheram, Kt, Chief Justice, and Mr. Justice Straight.

QUEEN-EMPRESS *v.* SYED HUSAIN.

Act XLV of 1860 (*Penal Code*), *ss.* 24, 25, 471—*Fraudulently using as genuine a forged document—" Dishonestly "—" Fraudulently."*

The creditors of a police-constable applied to the District Superintendent of Police that Rs. 2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for Rs. 18, the whole amount due. It subsequently appeared that the receipt was one for Rs. 8, which the debtor had altered by adding the figure "1," so as to make it appear that the receipt was for Rs. 18.

Held that the real intent in the prisoner's mind being to induce his superior officer to refrain from the illegal act of stopping a portion of his salary, the Court

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in a criminal case ought not to speculate as to some other intent over and above this that might have presented itself to him, that it did not necessarily follow that he contemplated setting up the altered receipt to defeat his creditor's claim, and that therefore he ought not to have been convicted of an offence under s. 471 of the Penal Code.

THIS was an appeal from an order of Mr. G. E. Knox, Sessions Judge of Agra, dated the 3rd December, 1884, convicting the appellant of forgery.

The appellant, a police-constable serving at Muttra, was convicted in respect of a document purporting to be a receipt acknowledging the payment of money. The facts on which the conviction was founded were as follow:—He was indebted to one Debi Lal to the amount of Rs. 18-10-3 for cloth supplied. This cloth was supplied through the agency of one Balmukand. Owing to this fact such payments as the appellant made were made to Kishen Lal, Balmukand Lal's son. Debi Lal and Kishen Lal wrote a letter to the District Superintendent of Police at Muttra, complaining that the appellant owed Debi Lal Rs. 10-10-3, and would not pay him, and asking that Rs. 2 might be deducted monthly from the appellant's pay until the debt was satisfied. On this application the District Superintendent of Police made an order directing that the deduction asked for should be made, forwarding the order to the Inspector of the Muttra City Police, under whom the appellant was immediately serving. The Inspector showed the order to the appellant, who asserted that he had paid the debt, and in support of this assertion produced a receipt, in Mahajani character, which he gave to the Inspector, who forwarded it to the District Superintendent with a report and a petition from the appellant, in which he stated that he had paid the debt as the receipt showed. With reference to the receipt and the appellant's petition, the District Superintendent made an order directing the Inspector to refer Debi Lal and Kishen Lal to the Civil Courts. The Inspector accordingly sent for these persons, and informed them of the order, and showed them the receipt. On seeing the receipt, Kishen Lal said that it was one for Rs. 8, which had been given by him to the appellant, and that it had been altered, so as to make it appear that it was a receipt for Rs. 18. It appeared that in the receipt the sum acknowledged to have been paid had been stated in words and figures to be Rs. 8.

Where the sum was stated in figures, it appeared that the figure "1" had been added to the figure "8."

The appellant's defence was, that he had paid Rs. 18 to Kishen Lal, and had received from him a receipt for that amount, that he had given that receipt to the Inspector and not the receipt which had been forwarded to the District Superintendent, and in respect of which he was charged with forgery, and that the latter receipt had been forwarded, instead of the original, by the police of the Muttra station, who were hostile to him.

In this appeal, Mr. *G. T. Spankie* (with him Mr. *W. M Colvin*) contended for the appellant that the receipt in respect of which he had been convicted was not the receipt which Kishen Lal had given him and which he had given to the Inspector; and that, assuming that this was not so, the appellant had not acted in the matter "dishonestly" or "fraudulently," within the meaning of the Penal Code, inasmuch as his intention, in regard to the receipt, was to induce the District Superintendent to refrain from the illegal act of stopping his pay to satisfy Debi Lal's claim. The following cases were referred to:—*Reg* v. *Bhavanishankar* (1); *Queen* v. *Lal Gumul* (2); *Queen* v. *Jageshur Pershad* (3); *Empress* v. *Mazhar Husain* (4).

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The Court (PETHERAM, C. J., and STRAIGHT, J.) delivered the following judgment:—

STRAIGHT, J.—We think it must be taken as satisfactorily established that the receipt forwarded by the appellant to his official superiors, and now upon the record, was the receipt for Rs. 8 originally given him by Kishen Lal, and that it had been altered in the manner sworn to by that person. There is, however, no proper evidence against the appellant of forgery, and the charge made against him would more properly have been framed under s. 471 of the Penal Code. It is in this aspect that we think the case against him should be regarded, and the question for determination in his appeal therefore is, did the appellant use the receipt as a

(1) 11 Bom. H. C. Rep., 3.
(2) N.-W. P. H C. Rep, 1870, p 11.
(3) N.-W. P. H. C. Rep., 1874, p. 55.
(4) I. L. R., 5 All 553.

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genuine document, knowing or having reason to believe it had been altered, with intent to defraud, or to cause wrongful gain to himself, or wrongful loss to Debi Lal? That is to say, is the intent required by the law made out in fact? It must be observed that the alteration in the receipt, which is in Mahajani character, is made very clumsily by the interpolation of a Hindi figure, and it could hardly be expected to escape any but the most cursory inspection. It seems scarcely credible the appellant could ever had contemplated that it would pass muster in any Court, or prove of any practical use except to save his pay from being cut. It is obvious that this was the immediate object and purpose he had in view in using it, and that the actual intent he had in his mind at the time was to deceive the police authorities and lead them to refuse to accede to the petition put in by Debi Lal. But it must be borne in mind that they had no legal right or authority to stop any portion of the appellant's salary except upon a proper attachment by a Civil Court; and therefore it comes to this, that the appellant used the altered receipt in order to induce his superior officer to refrain from doing an illegal act. This, to our minds, was the real intent in the mind of the prisoner, and we do not think that in a criminal case we ought to speculate as to some other intent over and above this that might have presented itself to him. For it does not, in our opinion, at all necessarily follow that, because the appellant objected to have his pay put under monthly stoppages to satisfy his creditor's debt, that he therefore necessarily contemplated setting up the altered receipt to defeat his creditor's claim. In this view of the matter we think there was a doubt in the case to which the appellant was entitled, and under these circumstances his appeal must be allowed, and the conviction and sentence being set aside, he will stand acquitted, with the result that he may be discharged.

CIVIL REVISIONAL.

1884
December 15.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

SUNDAR DAS (PURCHASER) *v.* MANSA RAM AND OTHERS (JUDGMENT-DEBTORS).*

Execution of decree—Civil Procedure Code, s. 320—*Transfer of decree to Collector for execution—Jurisdiction—Rules made by Local Government—Civil Procedure Code, s.* 622—*High Court's powers of revision.*

A decree passed by a Subordinate Judge upon a bond, in which certain immoveable property was mortgaged, was, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, transferred to the Collector for execution. A sale in execution took place, and the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and, upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree.

Held that, with reference to the second paragraph of Rule 19 of the Rules framed by the Local Government under s. 320 of the Civil Procedure Code regarding the transmission, execution, and re-transmission of decrees, and published in the *N.-W. P. and Oudh Gazette* of the 4th September, 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of s. 320, and notwithstanding the ruling of the Full Bench in *Madho Prasad* v. *Hansa Kuar* (1).

Held also that, inasmuch as the Subordinate Judge had jurisdiction to decide the question, and inasmuch as, even if his decision were wrong, the purchaser had a remedy by bringing a regular suit, the matter did not fall within s. 622 of the Civil Procedure Code, so as to call for the interference of the High Court in revision. *Shivanathaji* v. *Joma Kashinath* (2) and *Amir Hasan Khan* v. *Sheo Baksh Singh* (3) referred to.

THIS was an application for revision under s. 622 of the Civil Procedure Code of an order passed by the Subordinate Judge of Benares, and dated the 1st March, 1884, under the following circumstances:—It appeared that a mauza called Sabahipur, together with six smaller villages, formed a single taluqua which was called by the name of the principal village Sabahipur, and the whole taluqua was assessed with the revenue payable to Government, and

* Application No. 111 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 1st March, 1884.

(1) I. L. R., 5 All., 314.
(2) I. L. R., 7 Bom., 341.
(3) I. L. R. 11 Calc., 6.

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amounting to Rs. 203. At the settlement, all papers connected with the settlement record were separately prepared, and the papers of each village formed a separate book. All the villages belonged to the same persons, who were judgment-debtors under a decree passed by the Subordinate Judge upon a bond executed by them in favour of one Murari Das, in which Mauza Sabahipur was mortgaged as bearing the revenue payable in respect of the whole taluqua. In the plaint in that case, the mortgage was sought to be enforced against Mauza Sabahipur only, and the decree apparently did not affect any other village. An application for execution of the decree was made to the Subordinate Judge by the decree-holder, in which no reference was made to any of the other six villages, and only Sabahipur was attached in execution. The decree was transferred by the Subordinate Judge, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, to the Collector for execution. A sale then took place, and the Collector gave the purchaser a certificate of sale in which the sale of Mauza Sabahipur only was certified. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of the entire taluqua, and, upon the refusal of the Court to do so, applied to the Collector to amend the certificate of sale so as to include the other six villages. The Collector having amended it as desired, the decree-holder again applied to the Subordinate Judge for possession of the taluqua, and the Subordinate Judge again rejected the application, holding that only Mauza Sabahipur had been sold in execution of the decree.

The purchaser now applied to the High Court to revise the Subordinate Judge's order on the following grounds:—

(i) That the Subordinate Judge had no jurisdiction to pass any order on the case, it having been transferred to the Collector.

(ii) That in disposing of the application of the purchaser for possession of the property, the lower Court ought not to have gone behind the sale-certificate to determine what property had actually been sold.

(iii) That all proceedings connected with the sale showed that the whole taluqua had been sold.

Mr. *T. Conlan*, Mr. *N. L. Paliologus*, and Pandit *Ajudhia Nath*, for the petitioner.

Lala *Lalta Prasad* and Munshi *Kashi Prasad*, for the judgment-debtors.

The pleaders for the judgment-debtors were not called on.

MAHMOOD, J.—Mr. Conlan has argued that we are bound by the ruling of this Court in *Madho Prasad* v. *Hansa Kuar* (1) to revise the order of the Subordinate Judge in this case, on the ground that he had no jurisdiction to alter the sale-certificate, or to dispute the entries contained therein as to the amount of property sold. We have considered this argument, but we are of opinion that, with reference to the second paragraph of Rule 19 of the Rules framed by the Local Government under s. 320 of the Civil Procedure Code, regarding the transmission, execution, and re-transmission of decrees, and published in the *N.-W. P. and Oudh Gazette* of the 4th September, 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of s. 320, and notwithstanding the Full Bench ruling to which Mr. Conlan has referred. It may be (though as to this I express no opinion) that the Subordinate Judge's order of the 1st March, 1884, was erroneous upon the merits. But we hold that he had jurisdiction to pass the order, and even if his order was erroneous, the matter does not fall within s. 622 of the Civil Procedure Code, so as to call for the interference of this Court in revision. Any other view would lead to the conclusion that s. 622 virtually gives a right of appeal in cases where the Legislature distinctly intended the decision to be final. This I regard as erroneous. I agree in the principles laid down by West, J., in the Bombay Full Bench case of *Shivanathaji* v. *Joma Kashinath* (2) in which the other Judges of the Bombay High Court concurred, and in particular with the following observations reported at p. 372:—"Where a decree or order of a subordinate Court is declared by the law to be, for its own purposes, final or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness

(1) I. L. R., 5 All., 314. (2) I. L. R., 7 Bom., 341.

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and certainty should, in such cases, be in some measure accepted, instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed; but where the alleged or apparent error consists in a misappreciation of evidence, or misconstruction of the law, intrinsic to the injury and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that, by the ordinary and prescribed method, an adequate remedy, or the intended remedy cannot be had." In the present case, it is not contended that if the petitioner has really been aggrieved, he has no remedy by bringing a regular suit.

A similar view of s. 622 appears to have been taken by their Lordships of the Privy Council in the recent case of *Amir Hasan Khan* v. *Sheo Baksh Singh* (1). That was an appeal from a decision of the Judicial Commissioner of Oudh reversing the concurrent judgments of two lower Courts. By s. 21 of Act XIII of 1879 (the Oudh Civil Courts Act), such reversal was only possible by exercise of the powers conferred by s. 622 of the Civil Procedure Code. In allowing the appeal, their Lordships made the following observations :—"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case, and, even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

This appears to me to settle the question. I have already said that the Subordinate Judge had jurisdiction to decide the present matter; and that, although he may have decided wrongly, the petitioner would not be deprived of his remedy by a regular suit. I am therefore of opinion that no sufficient ground for interference in revision has been established, and that consequently the application should be dismissed with costs.

BRODHURST, J., concurred.

Application dismissed.

(1) I. L. R., 11 Calc.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885
January 14.

SURTA AND OTHERS (PLAINTIFFS) *v.* GANGA AND OTHERS (DEFENDANTS)*

Civil Procedure Code, ss. 206, 622—*Order amending decree—High Court's powers of revision.*

A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say that he accepted the appeal, and that the decree as it stood failed to give effect to the judgment.

Per OLDFIELD, J.—That the order passed by the Judge under s. 206 could not be made the subject of revision by the High Court under s. 622 of the Civil Procedure Code, because there was an appeal from the amended decree, which became the decree in the suit, and superseded the original decree.

Per MAHMOOD, J.—That an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under s. 588. Also that, in saying that by "dismissed," his predecessor meant "decreed," the Judge had altered the decree in a manner not waranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Code, and that the Court was consequently competent to revise his order.

Raghunath Das v. *Raj Kumar* (1) referred to.

THIS was an application by the plaintiffs in a suit for revision, under s. 622 of the Civil Procedure Code, of an order amending the appellate decree in the suit passed under s. 206 by the District Judge of Saháranpur. The terms of that order were as follow :—

"This application is made with regard to an order of my learned predecessor, Mr. Keene, on the 4th May, 1882, in appeal. The Munsif had given the plaintiffs a decree for a half share in the *chaupal* of a village. On appeal, the Judge held that the *chaupal* was common to the two *pattis*, and its court-yard with it, and that it must be held to be exempt from partition. The Munsif's order was entirely cancelled. But by an obvious error the Judge wrote, 'I therefore dismiss the appeal with costs,' when clearly what he meant to say was that he accepted the appeal, and cancelled the order of the lower Court with costs.....S. 206 seems especially applicable to a case of this kind, when the decree,

* Application No. 201 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of C. W. P. Watts, Esq., District Judge of Saháranpur, dated the 10th June, 1884.

(1) *Ante*, p. 276.

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by an oversight, is out of all harmony with the judgment. I accept this application, and order th at the last clause of the appellate order do run thus—'I therefore accept the appeal, and cancel the Munsif's order with costs,' instead of—'I therefore dismiss this appeal with costs.'"

On the present application it was contended on behalf of the petitioners that s. 206 of the Civil Procedure Code did not authorize the alteration of the decree of the 4th May, 1882, in the manner shown.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the applicants.

Babu *Ram Das Chakarbati* and Munshi *Ram Prasad*, for the defendants.

OLDFIELD, J —In my opinion, there is no power to entertain this reference under s. 622 for the reasons I have given in the similar case of *Raghunath Das* v. *Raj Kumar* (1). There is, in my opinion, an appeal from the amended decree, and consequently s. 622 has no application. The amended decree becomes the decree in the suit and supersedes the original decree. If, instead of applying under s. 622, the party had instituted an appeal from the decree as amended, I cannot think he could be met by the plea that there was no appeal, and if this is so, his proper cause is by way of appeal. S. 540 allows an appeal from every decree or from any part of them, and the decree as amended becomes, in my opinion, the decree in the suit. It is not the decree as it stood before amendment that can be considered the decree in the suit, but the decree after amendment, and there cannot be two decrees at one and the same time in the same suit.

I would, on the above grounds, dismiss this application. I shall make no order as to costs.

MAHMOOD, J.—I regret that, for the second time on a question of this nature, my brother Oldfield and I are unable to arrive at the same conclusion. I need not say much on the subject, because in the recent case of *Raghunath Das* v. *Rajkumar* (1) I explained my reasons for thinking that an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate

(1) *Ante*, p. 276.

from that concluded by a decree under the Code passed after the parties had been heard and evidence taken. The order in the present case then is a separate adjudication, and is not appealable under s. 588. So that the only question which we have to consider is, whether the matter is one of which we can take cognizance in revision under s. 622. To decide this the following facts must be borne in mind :—

The plaintiffs' claim for a share in certain property was decreed by the Munsif of Deoband on the 31st October, 1881. The defendants appealed to Mr. H. G. Keene, at that time District Judge of Saháranpur, who, on the 4th May, 1882, passed a decree, in which he clearly said that he dismissed the appeal with costs. No appeal from this decree was filed, though I should say that a second appeal would lie, under s. 584 of the Code. But on the 10th June, 1884, the defendants filed an application, purporting to be one under s. 206 of the Civil Procedure Code, to Mr. Watts, who had succeeded Mr. Keene as Judge of Saháranpur, praying him to amend the decree by substituting the word "decreed" for "dismissed." Of course there could be no question here of an "arithmetical" error in the decree, so that it was probably said that there was a "clerical" error. Mr. Watts was asked to interfere under the last paragraph of s. 206 of the Civil Procedure Code.

Now in my judgment in *Raghunath Das* v. *Roj Kumar* (1), to which I have already referred, I anticipated the very difficulty which arises here if we cannot interfere in revision with the order passed by Mr. Watts. I observed that a "Court which goes beyond what is warranted by the last paragraph of s. 206 may practically be altering the nature of the decree. If such a course were allowed, any Judge, who (as sometimes happens) took an erroneous view of his own judgment, might say, 'I meant so and so by my judgment on this point and on that,' and thus might make alterations going far beyond merely clerical or arithmetical corrections." That anticipation has actually been realized in the present case. Not only have we here the case of a Judge who undertakes to say what his predecessor meant, but he goes so far as to say that by "dismissed" his predecessor meant "decreed!"

(1) *Ante*, p. 276.

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I do not consider that Mr. Watts has correctly interpreted the language used by Mr. Keene, or that the decree of the latter failed to give effect to his judgment. I am therefore of opinion that Mr. Watts has exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Civil Procedure Code, and that the Court is therefore competent to revise his order. I would allow the application, and, without interfering with the decree of the 4th May, 1882, set aside the order of the 10th June, 1884.

FULL BENCH.

1885 *January* 17.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* PERSHAD AND OTHERS.

Act XLV of 1860 (*Penal Code*), *s.* 71—*Criminal Procedure Code, ss.* 39, 235—*Rioting, grievous hurt, and hurt—Punishment for more than one of several offences—Powers of Magistrate of first class conferred on Magistrate of second class during trial—Power to sentence as first class Magistrate—Charge, alteration of.*

On the 8th August, 1884, a Magistrate of the second class began an inquiry in a case in which several persons were accused of rioting and of voluntarily causing grievous hurt. On the 6th September, the powers of a Magistrate of the first class were conferred on the Magistrate by an order of Government, which was communicated to him on the 8th September. On the 9th September, the case for the prosecution having closed, the Magistrate framed charges against each of the accused under ss. 323 and 325 of the Penal Code, recorded the statements of the accused and the evidence for the defence, and, on the 10th September, convicted the accused of all the charges, passing upon each of them, in respect of each charge, sentences which he could pass as a Magistrate of the first class, but could not have passed as a Magistrate of the second class. On appeal, the Sessions Judge, on the ground that the prisoners had committed the offence described in s. 148 of the Penal Code, held that the sentences passed by the Magistrate were illegal, as being inconsistent with the provisions of s. 71, paragraphs 2 and 4; and he accordingly reduced the sentences to imprisonment which the Magistrate had passed to the maximum of imprisonment which the Magistrate could have inflicted under s. 148.

Held by the Full Bench (PETHERAM, C. J., and BRODHURST, J., dissenting) that the sentences passed by the Magistrate were legal.

Per OLDFIELD, MAHMOOD, and DUTHOIT, JJ., that, with reference to the terms of s. 39 of the Criminal Procedure Code, a Magistrate of the second class who has begun a trial as such and continued it in the same capacity up to the passing of sentence, and who, prior to passing sentence, has been invested with the powers of a Magistrate of the first class, is competent to pass sentence in the case as a Magistrate of the first class.

Per OLDFIELD and DUTHOIT, JJ., that the provisions of s. 71 of the Penal Code had no application to the case, inasmuch as the offences of causing grievous hurt and hurt formed no part of the offence of rioting.

Per PETHERAM, C. J., that a case must be taken to be tried upon the day the trial commences; that, for all the purposes of the trial, the Magistrate in this case retained the *status* of a Magistrate of the second class; and that he was therefore not competent to pass sentence as a Magistrate of the first class.

Also *per* PETHERAM, C. J., that the Judge, in this case, had no power to alter the charge or to frame a new charge in any way.

Per BRODHURST, J., that the sentences passed by the Magistrate were, as a whole, illegal; that, if he had convicted the accused under s. 148 of the Penal Code, his order would, under the circumstances, have been legal; that a Court of Appeal is not competent to alter the finding of a Magistrate so as to convict an accused person of an offence which the Court of which the order is in appeal was not competent to try; and that a member of an unlawful assembly, some members of which have caused grievous hurt, can be legally punished for the offence of rioting as well as for the offence of causing grievous hurt. *Empress* v. *Dungar Singh* (1) referred to.

THIS was a case which was reported to the High Court for orders by Mr. C. J. Daniell, Sessions Judge of Farukhabad. It appeared that on the 8th August, 1884, Mr. A. L. Saunders, Magistrate of the second class, commenced the inquiry in a case in which Pershad, Karan, Dharam Pal, and four other person were accused of rioting and voluntarily causing grievous hurt. Of the accused, only the persons whose names are mentioned were present before the Magistrate, the others not having been arrested. On the 8th September, 1884, the Government order, dated the 6th September, 1884, conferring on Mr. Saunders the powers of a Magistrate of the first class, was communicated to him. On the 9th September, 1884, the Magistrate, the case for the prosecution being concluded, framed two charges against Pershad, Karan, and Dharam Pal, jointly, under s. 325 of the Penal Code, the first being a charge of voluntarily causing grievous hurt to one Kundan, and the second, a similar charge in respect to one Chittar, the time and place in both charges being the same. He also framed a third charge against them, under s. 323 of the Penal Code, of having, at the same time and place, voluntarily caused hurt to four persons named in the charge. On the 10th September, 1884, the Magistrate convicted the three accused, and in the exercise of the powers of a Magistrate of the first class, sentenced them as follows:—For voluntarily causing

(1) Ante, p. 29.

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grievous hurt to Kundan, to two years' rigorous imprisonment each, and a fine of Rs 20, or, in default, to two months' further rigorous imprisonment: for voluntarily causing grievous hurt to Chittar, one year's rigorous imprisonment each, and a fine of Rs. 10, or, in default, to one month's further rigorous imprisonment: for voluntarily causing hurt to the persons named in the third charge, three months' rigorous imprisonment each, and a fine of Rs. 5, or, in default, to further rigorous imprisonment for fifteen days, in respect of each of the four persons injured. The total sentence passed on each accused was thus four years' rigorous imprisonment and Rs. 50 fine, or, in default, five months' further rigorous imprisonment. The Magistrate further directed, under s. 106 of the Criminal Procedure Code, that each accused should give certain security to keep the peace for two years.

The convicted persons appealed to the Sessions Judge, who reported the case to the High Court, for the reasons which appear in his judgment, which was in these terms:—

"I think the Subordinate Magistrate's arguments are ingenious, under which he has sentenced each of the appellants to more than three years' imprisonment and fine, but that the decision is not consistent with the provisions of s. 71, paras. 2 and 4.

"The offenders were part of a gang of more than five men, who committed the offence described in s. 148 of the Indian Penal Code, and the beating and injuries which they inflicted on Kundan and Hulas were the natural result of the prosecution of their common and unlawful object, that is, the forcible rescue of their cattle from persons who were lawfully driving them to the cattle pound. It is not denied by the vakil of the accused persons that they committed rioting armed with lethal weapons (s. 148) and grievous and simple hurt (ss. 325, 323); and that being the case, the 2nd and 4th paras. of s. 71 of the Indian Penal Code seem to me particularly to apply. This seems to me to be the view taken by Straight, J., in *Empress* v. *Ram Partab* (1), in a similar case.

"The Subordinate Magistrate's (1st class) powers are not sufficient for the proper punishment of the appellants' offences, and he should have committed the case to the Sessions. As the case stands,

(1) I. L. R., 6 All, 121.

neither of the three offences above described as committed by appellants being exclusively triable by the Court of Session, I cannot order their commitment, and I must reduce the sentences to the limit laid down in the last para. of s. 71, Indian Penal Code, that is, to two years' rigorous imprisonment and a fine, which in his decision the Subordinate Magistrate has fixed at Rs. 50, or an alternative (rigorous) imprisonment for five months more, and I shall refer the case to the High Court with a view to this sentence being enhanced."

The case came for disposal before Mahmood and Duthoit, JJ., who referred the following questions to the Full Bench:—

"(1) Were the sentences passed by the Magistrate legal or illegal?

"(2) If Mr. Saunders had convicted the accused persons under s. 148 of the Indian Penal Code, would his order have been legal?

"(3) Is a Court of appeal competent to alter the finding of a Magistrate, so as to convict an accused person of an offence which the Court of which the order is in appeal was not competent to try?

"(4) May, or may not, a member of an unlawful assembly, some members of which have caused grievous hurt, be punished for the offence of rioting, as well as for causing grievous hurt?"

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

The following judgments were delivered by the Full Bench:—

DUTHOIT, J.—The first of the questions referred to the Full Bench is, whether the sentences passed by the Magistrate were legal or illegal? The learned Sessions Judge has held them to have been illegal, as being inconsistent "with the provisions of s. 71, paras. 2 and 4."

But the provisions of s. 71 of the Indian Penal Code do not fit the facts found by the Magistrate. *Illustration (b)* to that section runs thus:—"But if, while *A* is beating *Z*, *Y* interferes, and *A* intentionally strikes *Y*, here, as the blow given to *Y* is no part of the act whereby *A* voluntarily causes hurt to *Z*, *A* is liable to one punishment for voluntarily causing hurt to *Z*, and to another for the blow given to *Y*."

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And this is precisely the state of the facts found by the Magistrate in this case. It has also been suggested that as, when the trial commenced, the Magistrate, Mr. Saunders, had the powers of a second class Magistrate only, he had not the power to pass sentences of one year's imprisonment. I do not think that this fact makes the sentences passed by him illegal. Mr. Saunders was at the beginning of the trial only a Magistrate of the second class. Such a Magistrate is empowered by law to try charges under ss. 323 and 325 of the Indian Penal Code, but he cannot pass a sentence of imprisonment for a term exceeding six months. When, however, Mr. Saunders convicted the accused persons, he had the powers of a Magistrate of the first class. S. 39 of the Criminal Procedure Code provides that an order conferring powers under the Code shall take effect from the date on which it is communicated to the person so empowered. The District Magistrate has reported that the powers of a Magistrate of the first class, which were conferred on Mr. Saunders by orders of Government dated the 6th September, 1884, were communicated to Mr. Saunders on the 8th idem. The sentences were inflicted on the 10th September, 1884, and were within the competence of a Magistrate of the first class.

The question as to cumulative sentences has been disposed of by the ruling of the Full Bench of this Court in *Daulatia's Case* (1).

My answer to the first question put to us is, that the sentences were legal. And this being so, it is unnecessary for me to answer any of the other questions put to the Full Bench.

MAHMOOD, J.—I have arrived at the same conclusion. My reasons are concerned with ss. 39 and 349 of the Criminal Procedure Code. I understand the first question referred to us to be limited to the point whether a Magistrate of the second class, who begins a trial in that capacity, and continues it in the same capacity up to the passing of sentence, and who, previously to passing of sentence, has been empowered as a Magistrate of the first class, can inflict a severer sentence than he could have inflicted as a Magistrate of the second class. My opinion on this point is,

(1) I. L. R., 3 All, 305.

that he can. It seems to me that, in dealing with the point, the distinction between the competency of a Magistrate as regards his powers to try and his powers to pass sentences must be borne in mind. S. 39 of the Criminal Procedure Code says that every order conferring powers under the Code shall take effect from the date the order is communicated to the person so empowered. The order conferring on Mr. Saunders the powers of a Magistrate of the first class reached him on the 8th September. The sentence which he passed was within those powers. There is no doubt that he was competent to try the case. All that remained for him to do in the case when he was empowered as a Magistrate of the first class, was to pass sentence. S. 349 of the Code says that in a case of this kind, whenever a Magistrate of the second class, having jurisdiction, is of opinion that he cannot pass a sufficiently severe sentence, he may submit his proceedings to the District Magistrate. The analogy offered by this section shows the distinction between competency to try a case and competency to pass sentence. Supposing Mr. Saunders had not been invested with the powers of a Magistrate of the first class, he could have submitted the case under s. 349. But having those powers, it seems to me that, if he had not exercised them and had submitted the case under that section, he would have acted erroneously. The District Magistrate might have properly said to him, "you are a Magistrate of the first class, this section is intended for Magistrates of the second class."

Under this view of the case and of the distinction between competency to try a case and competency to pass sentence, I hold that Mr. Saunders was competent to pass the sentences he did. My answer to the first question is, therefore, in the affirmative, and that being so, I need not answer the remaining questions, which do not seem to me to be necessitated by the exigencies of the case.

BRODHURST, J.—The Assistant Magistrate, Mr. Saunders, at the time that he heard the evidence for the prosecution in this case, on the 8th and 13th August, 1884, was a Magistrate of the second class. He became a Magistrate of the first class on the 8th September, 1884; on the 9th *idem* he framed the charges,

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recorded the statements of the accused and the evidence for the defence, and, on the following day, the 10th September, he decided the case, and convicted and sentenced the accused under ss. 323 and 325 of the Indian Penal Code.

With reference to the evidence on the record the accused should, I consider, have been tried for the offences punishable under ss. 148, 323, and 325 of the Indian Penal Code; and the Assistant Magistrate, when drawing up the charges on the 9th September, should, I think, with reference to the provisions of s. 254 of the Criminal Procedure Code, have done so under each of the three last mentioned sections of the Penal Code. He should then, under s. 255 of the Criminal Procedure Code, have read and explained the charges to the accused, and should have asked them whether they were guilty or had any defence to make. If they did not plead guilty, but claimed to be tried, he should, under s. 256, have called upon each of them to enter upon his defence, and to produce his evidence, and he should at any time whilst they were making their defences have allowed them "to recall and cross-examine any witness for the prosecution present in the Court or its precincts."

As it is, the convictions generally, under ss. 323 and 325 of the Penal Code, are, in the absence of charges under ss. 148 and 149 of the Code, unsupported by the evidence, and cannot be sustained with reference to the provisions of ss. 109 and 114 of the Penal Code; and as very serious offences have been committed, the accused should, I think, be re-tried under ss. 148 and 149, and ss. 323 and 325 of the Indian Penal Code.

My answer to the four questions referred are as follows:—

1. The sentences passed by the Magistrate are, as a whole, illegal.

2. If Mr. Saunders had convicted the accused persons under s. 148 of the Indian Penal Code, his order would, under the circumstances above stated, have been legal.

3. A Court of appeal is not competent to alter the finding of a Magistrate, so as to convict an accused person of an offence which the Court of which the order is in appeal was not competent to try.

4. For reasons which I have stated at length in my judgment in *Empress* v. *Dungar Singh* (1), a member of an unlawful assembly, some members of which have caused grievous hurt, can, in my opinion, be legally punished for the offence of rioting as well as for the offence of causing grievous hurt.

OLDFIELD, J.—The accused Pershad, Karan, and Dharam Pal, were sent up by the police to the Court of Mr. Saunders, a Magistrate of the second class, for trial on charges of rioting (s. 147) and voluntarily causing grievous hurt (s. 325).

Mr. Saunders commenced the trial, as a Magistrate of the second class, on the 13th August. He was appointed by Government to be a Magistrate of the first class by order dated the 6th September, 1884, which was communicated to him on the 8th of that month, and subsequently he framed charges against the accused—(1) of voluntarily causing grievous hurt (s. 325) to Kundan; (2) a like charge in respect of one Chittar; and he further charged the accused with voluntarily causing hurt (s. 323) to—(1) Hulas, (2) to Kesri, (3) to Dharamjit, and (4) to Akbar; and, after taking their defence, he convicted them on all the charges, and on the first charge sentenced each to two years' rigorous imprisonment, and a fine of Rs. 20, or two months' rigorous imprisonment; on the second charge to one year's rigorous imprisonment, and a fine of Rs. 10, or one month; and on the further charges, to three months' rigorous imprisonment, and a fine of Rs. 5, or fifteen days' rigorous imprisonment in respect of each offence charged; making the total sentence amount to four years' rigorous imprisonment, and a fine of Rs. 50, or five months' rigorous imprisonment.

He further directed them to execute a bond for keeping the peace, with sureties, under s. 106 of the Criminal Procedure Code.

We are asked whether the sentences passed are legal or illegal. In my opinion they are legal.

Mr. Saunders had jurisdiction to try the accused as a Magistrate of the second class, but the sentences of imprisonment which he could pass as a Magistrate of the second class were limited to

(1) Ante, p. 29.

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imprisonment for a term of six months, and he had no power to take security for keeping the peace under s. 106.

He could not, therefore, as a second class Magistrate, pass the sentences or make the order which he did; but on the 6th September, the Government appointed him to be a first class Magistrate, under the authority given by s. 13, Criminal Procedure Code; and the order was communicated to him on the 8th September, and in my opinion his appointment took effect from that date, and he was in a position to deal with the case as a Magistrate of the first class, and to exercise the powers which the law confers on a Magistrate of the first class, and to pass the sentences which he passed and to make an order under s. 106, all which were within his competency as a Magistrate of the first class.

I do not think that his power to deal with the case as a Magistrate of the first class is at all affected by the fact that the case came before him in the first instance in his capacity as a Magistrate of the second class.

There is here no question of jurisdiction to try the case, as Mr. Saunders could try the charges either as a Magistrate of the second or first class. The only question is one as to the sentence or order which could be passed upon convictions, the power of a second class Magistrate being more limited; but when his powers were extended by his appointment to be those of a Magistrate of the first class, he was in a position to exercise them at once; for the order of Government took effect under s. 39 of the Code from the date on which it was communicated to him.

If it were otherwise, it is difficult to see how he was to deal with the case, when he considered the punishment which a Magistrate of the second class could inflict was not sufficient.

S. 349 provides that in such a case a second or third class Magistrate shall submit the case to the Magistrate of the District, or Sub-Divisional Magistrate to whom he is subordinate, for sentence; but it is only a second or third class Magistrate who can make such a reference; and he had ceased to be a Magistrate of the second class at the time when such a reference could be made under that section. He would have been in the singular

position of a *de facto* Magistrate of the first class taking proceedings as a Magistrate of the second class, which, as a fact, he was not, and referring the case to another Magistrate, to pass a sentence, which, as a first class Magistrate, it was in his power to pass. I cannot think the Code contemplates such a state of things.

Nor do I consider that the separate convictions are illegal. The Judge is wrong in holding that s. 71 of the Penal Code has any application. There is here no case of an offence made up of parts, any of which parts is itself an offence. The offence of voluntarily causing grievous hurt and hurt form no part of the offence of rioting, which is a separate offence; and in the same way each assault forms a separate offence, and could be dealt with separately. The *Illustrations* to s. 235, Criminal Procedure Code, especially *Illustration* (*g*), sufficiently show this to be so.

I would answer the first question by saying that the Magistrate's sentences are legal, and in this view the grounds on which the Judge interfered with the convictions and sentences, and on which he made a reference to this Court, cannot be supported, and it is unnecessary to consider the other questions put to us.

It will be for the Divisional Bench to dispose of the reference from the Judge, and make such orders as the case requires.

PETHERAM, C. J.—I am of opinion that the sentences are illegal. The prisoners were charged before Mr. Saunders, Magistrate of the second class. He had power to try them, but he had not power, as a Magistrate of the second class, to inflict the sentences which he did. For all purposes of the trial, Mr Saunders' *status* could not be altered. As I understand the law, a case is supposed to be tried on the day the trial commences, and after that day the case proceeds by adjournment. The only date to be looked at as the date of trial is the date of the first day of trial. Therefore, for all intents and purposes, the Mr. Saunders who finished the trial is the same Mr. Saunders who began it. The case is the same case, the day, the same day, the trial, the same trial, all through. If the books are examined, it will be found that this point has been repeatedly decided. My answer therefore to the first question is in the affirmative.

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As to the other questions, with the exception of the third, they do not arise. As to the power of altering the charge, I am of opinion that the Judge had no power to alter the charge, or frame a new charge, in any way.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

FATEH MUHAMMAD (JUDGMENT-DEBTOR) *v.* GOPAL DAS (DECREE-HOLDER).*

Execution of decree—Contract superseding decree—Adjustment of decree—Certification—Civil Procedure Code, s. 258—*Limitation—Acknowledgment in writing—Act XV of* 1877 (*Limitation Act*), *s.* 19.

In the course of proceedings in execution of a decree dated the 14th June, 1878, the parties, on the 11th January, 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. The deed recited that the decree was under execution, and that a mortgage-bond dated the 1st December, 1873, in favour of the judgment-debtor by a third party, had been attached and advertized for sale, and that the decree-holder and judgment-debtor had arranged the following method of satisfying the decree: that the judgment-debtor should make over the said bond to the decree-holder, in order that he might bring a suit thereon at his own expense against the obligor, and realize the amount secured by the bond, and out of the amount realized satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against the obligor, and together with a sum due by the judgment-debtor to the decree-holder under a note-of-hand for Rs. 250 with interest; and other details which need not be stated. On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the bond advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution, with interest and costs; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and the previous attachment maintained; and stating that, after realization of the amount entered in the bond advertized for sale, an application for execution would be duly filed. On this the order was that the execution-case be struck off the file, and the attachment maintained. On the 24th December, 1883, the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment-debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January, 1881, and that the application was barred by limitation, the previous application being dated the 9th November, 1880.

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* First Appeal No. 110 of 1884, from an order of J. L. Denniston, Esq., District Judge of Ghazipur, dated the 19th March, 1884.

Held that the application was within time, inasmuch as the acknowledgment in the deed of the 11th January, 1881, came within the terms of s. 19 of the Limitation Act, so as to originate a fresh period of limitation in respect of the execution of the decree. *Ghansham* v. *Mukha* (1), *Janki Prasad* v. *Ghulam Ali* (2), and *Ramhit Rai* v. *Satgur Rai* (3) followed.

Per OLDFIELD, J.—That the agreement of the 11th January, 1881, did not contemplate, and had not the effect of cancelling the decree and substituting for it a new contract, inasmuch as the deed contained nothing to the effect that the decree was superseded, and all it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. Further, if the arrangement was to be regarded as within the meaning of an adjustment of the decree under s. 258 of the Civil Procedure Code, it could only be recognized by the Court when certified by the decree-holder or judgment-debtor : and in this case the only certification which was made was by the decree-holder, by his petition of the 11th January, 1881, which was in respect of a temporary arrangement under which the decree remained in force.

Per MAHMOOD, J.—That the agreement of the 11th January, 1881, was intended by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract ; but that the deed could not be regarded as such an adjustment of the decree as satisfied the requirements of s. 258 of the Civil Procedure Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist ; and that therefore the certification of the adjustment was inadequate, and could not be recognized in executing the decree.

THE decree of which execution was sought in this case was dated the 14th June, 1878. It appeared that on the 11th January, 1881, in the course of proceedings in execution of the decree, the parties entered into an agreement, which was registered, and filed in the Court executing the decree, with a petition by the decree-holder. That agreement was to the following effect:—

"We, Fateh Muhammad, and Gopal Das, decree-holder, do hereby declare as follows:— That I, Fateh Muhammad, owe up to this time Rs. 1,385-1-3 under a decree to Gopal Das, decree-holder, of Benares, and Rs. 250 under a note-of-hand held by the said creditor ; that the decree is under execution in the District Court of Benares, under certificate, and on the application of the said decree-holder for attachment, a mortgage-deed, dated the 1st

(1) I. L. R., 3 All. 320.
(2) I. L. R., 5 All. 201.
(3) I. L. R., 3 All. 247.

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December, 1873, in favour of Kandhaia Lal, is advertized for sale on the 11th January, 1881; that I, the debtor, and the decree-holder have arranged for the payment of the amount of the decree in this way,—that I, the debtor, should make over the said mortgage-deed to the judgment-creditor in order that he should bring a suit thereon on my behalf under his own superintendence and at his own expense against the mortgagor, Kandhaia Lal, and realize the amount secured by the deed; that out of the said amount he is to realize the whole of the amount of the decree under execution, with costs and future interest which may be found due from the date of the decree to date of realization, also costs of all sorts up to date of realization on account of the regular suit to be brought against Kandhaia Lal aforesaid, and also the sum due to him (decree-holder) under the note-of-hand for Rs. 250 mentioned above, with interest thereon due to the said Babu by me the said debtor; that from the balance the Babu is to receive his remuneration for the trouble of instituting the aforesaid suit, at the rate of 5 per cent., and to pay what remains out of the amount realized to me, the debtor; that I, the debtor, shall have no right to interfere, except to receive the balance; that I shall not make any contract of adjustment or transfer of any sort, as regards the amount secured by the mortgage-deed aforesaid, with the obligor of the said document, or with any other person, and if I do so, such contract shall be invalid; that should the obligor aforesaid or his representative come forward to settle the matter, then I, the debtor, and the aforesaid creditor, Babu Gopal Das, shall with mutual consent come to some terms, and accordingly a detailed compromise will be executed under the signatures of me, the debtor, and the Babu Sahib aforesaid; that if the settlement of the matter should appear at the time to be expedient, each party shall be bound by such settlement; and that the decree-holder has accepted this arrangement and admitted it for the benefit of me.

"I, Babu Gopal Das, decree-holder, creditor, do hereby declare that I have accepted the conditions of this compromise.

"For this reason we, both parties, having executed this compromise, as defined in art. 20, sch. i, Act I of 1879, on a stamped paper of the value of Rs. 10, have got it registered."

The petition of the decree-holder was to the following effect:—

"That the case of execution of decree of the petitioner (decree-holder) against Shaikh Fateh Muhammad, judgment-debtor, is pending in the Court, and a mortgage-deed attached at the instance of the decree-holder is advertised for sale to be held to-day, the 11th January, 1881. The judgment-debtor came to the petitioner, and under an agreement executed to-day and duly registered, made this arrangement for payment of the judgment-debt: that he made over to the petitioner the original deed advertised for sale, in order that he (the petitioner) should file a suit under it at his own cost against the obligors thereof, and realize the judgment-debt due under the decree sought to be executed, with interest and costs, &c. The petitioner (decree-holder) has accepted this arrangement. He therefore files this petition and prays that the sale to be held to-day may be postponed and the application for execution of decree be struck off for the present and the previous attachment maintained. After realization of the amount entered in the document advertised for sale, an application for execution of the decree will be duly filed."

On this petition the Court made an order directing that the execution-case should be struck off the file and the attachment should be maintained.

On the 24th December, 1883, the decree-holder applied for execution of the decree. The judgment-debtor objected to this application on the ground that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January, 1881, and that the application was barred by limitation, the previous application being dated the 9th November, 1880. The decree-holder replied to these objections that, as the judgment-debtor had failed to carry out the provisions of the agreement, and there was nothing in the agreement preventing execution of the decree, he, the decree-holder, was entitled to execution; and that, as in the agreement the judgment-debtor acknowledged the debt, under s. 19 of the Limitation Act, a fresh period of limitation began to run from the date of the agreement, and the application was within time.

The lower Court disallowed the objections of the judgment-debtor, allowing the contention of the decree-holder.

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The judgment-debtor appealed to the High Court, repeating the objections taken by him in the Court below.

Lala *Lalta Prasad*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

OLDFIELD, J. — This is an appeal from an order on an application by the decree-holder for execution of a decree dated the 14th June, 1878. It has been allowed by the Judge and the judgment-debtor has appealed. The objection that the application is barred by limitation has no force, since the Judge is right in holding that there was an acknowledgment of liability on the part of the judgment-debtor on the 11th January, 1881, in writing, which saves limitation. The other objection is, that the decree is no longer fit to be executed, since it was superseded by a new contract under the instrument of the 11th January, 1881. It appears that execution had been taken out, by attachment and sale of a mortgage-bond in favour of the judgment-debtor by one Kandhaia Lal, and the sale was advertized to take place on the 11th January, 1881. On that day the parties executed a deed on which the judgment-debtor relies. That instrument refers to the fact that the decree is under execution, and that a mortgage-deed, dated the 1st December, 1873, executed by Kandhaia Lal, *Kalwar*, of Mirdadpur, is advertized for sale, and that the decree-holder and judgment-debtor have arranged the following method of paying the decree : that the judgment-debtor shall make over the said deed to the decree-holder, in order that he shall bring a suit thereon on behalf of the judgment-debtor at his own expense against Kandhaia Lal, and realize the amount secured by the deed, and out of the amount realized satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against Kandhaia Lal, and together with a sum due by the judgment-debtor to the decree-holder under a note-of-hand for Rs. 250 with interest : that the decree-holder shall from the balance receive a remuneration for the trouble of instituting the aforesaid suit at the rate of 5 per cent., and pay to the judgment-debtor what remains out of the amount realized ; and it proceeds to say that any settlement between the judgment-debtor and Kandhaia Lal will be the subject of future arrangement between the judgment-debtor and the decree-holder.

On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the deed advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution, with interest and costs; and he prayed that the auction-sale to be held that day be postponed, and the application for execution of the decree be struck off for the present, and the previous attachment maintained; after realization of the amount entered in the deed advertized for sale, an application for execution of the decree will be duly filed. On this the order was that the case for execution of decree be struck off and the attachment be maintained. It appears that nothing was done under this agreement, and the decree-holder has now applied to execute his decree, alleging that the judgment-debtor failed to give effect to the agreement by making over the bond to him, and this has not been denied by the judgment-debtor. I am unable to hold that the arrangement entered into contemplated, or had the effect of, cancelling the decree and substituting a new contract in its place. All it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied, without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. If in whole, the decree would then be written off as satisfied; if in part, execution would proceed, the decree remaining in force until satisfied; and there is nothing in the deed to prevent the decree-holder executing the decree when the judgment-debtor failed to carry out the condition of the agreement. In a similar way a judgment-debtor might agree to make over the property to a decree-holder in order that he should realize the decretal amount from its proceeds, but the decree would not, in such a case, be cancelled. The deed contains nothing to the effect that the decree is superseded, and that henceforth the decree-holder's money is to be confined to the realization by suit on the bond. It is unlikely also that there should have been such an intention, considering the hazard and uncertainty of litigation.

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The terms of the deed, in the absence of any words to the effect that the decree was to be considered as cancelled and inoperative and the remedy confined to realization by suit on the bond, are susceptible of the meaning I have put on them, and that this was the meaning intended is shown by the petition put in on the same day by the decree-holder, and the order for continuing the attachment of the bond; and it is significant that the judgment-debtor never objected to the petition or to the continuance of the attachment. In this connection it is deserving of notice that if the arrangement is to be considered to come within the meaning of an adjustment of the decree under s. 258, Civil Procedure Code, it can only be recognized by the Court when certified by the decree-holder or judgment-debtor; and in this case the only certification which was made was by the decree-holder, by his petition of the 11th January, 1881, which was in respect of a temporary arrangement under which the decree remained in force. The objections, therefore, on the part of the appellant fail, and the appeal is dismissed with costs.

MAHMOOD, J.—I am of the same opinion, and I will add a few words only in order to explain my reasons. There appear to be two questions which require consideration. The first relates to limitation, as to the right of the decree-holder-respondent to obtain execution of his decree. The second is a question as to the merits, and it is whether the "*ikrar-nama*" of the 11th January, 1881, extinguished the decree, leaving the judgment-creditor a right to proceed under the contract then made.

Upon the first point the ruling of this Court in *Ghansham* v. *Mukha* (1) and the ruling of Tyrrell, J., and myself in *Janki Prasad* v. *Ghulam Ali* (2), which followed the Full Bench ruling in *Ramhit Rai* v. *Satgur Rai* (3), settle the matter. These decisions leave no doubt that the acknowledgment in the *ikrar-nama* comes within s. 19 of the Limitation Act, so as to originate a fresh period of limitation in respect of the execution of the decree.

The second question relates to the merits, and upon this point my view is somewhat different from that of my brother Oldfield. In my opinion this agreement of the 11th January, 1881, was intended

(1) I. L. R., 3 All. 320.
(2) I. L. R., 5 All. 201.
(3) I. L. R., 3 All. 247

by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract. But that is not the real matter before us, and the question really is whether, whatever may have been the effect of the agreement, the decree-holder has lost his right to execution. The law, as expressed in s. 258 of the Civil Procedure Code, allows the parties to a decree to satisfy it by subsequent arrangement. But it is obvious that, in order to effect its policy, and to make the exercise of this right beneficial, the Legislature was constrained to impose some limit. If the question were now before me, whether the agreement of the 11th January, 1881, did or did not extinguish the decree, and if I could go into the merits, I should perhaps answer the question in the affirmative. That deed of agreement, after reciting the conditions under which it was made, and what had been done in execution, and what money was due to the decree-holder, shows that both parties agreed to satisfy the decree by the decree-holder obtaining possession of a mortgage-deed executed in favour of the judgment-debtor by a third person. It also refers to a note-of-hand executed by the judgment-debtor in favour of the decree-holder, which must also be regarded as included in the scope of the new contract, as substituting a new obligation in lieu of a document creating an obligation in favour of the decree-holder and providing a method of payment. The only question now is, even assuming that this deed of agreement was intended as a fresh adjustment of the decree, is that adjustment of such a character as to allow us to say in the execution department that the decree has been extinguished? At first I entertained some doubt upon this question, but having considered the deed of the 11th January, 1881, I am now of opinion that it cannot be regarded as such an adjustment of the decree as s. 258 of the Code contemplates. The section, after creating the right to certify adjustments made out of Court, proceeds to limit that right by providing that "the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree." What this means is that the judgment-creditor must go the Court and say :—"My decree has been adjusted and extinguished; strike off the case." Now, in the present case, this application of the 11th January, 1881, did mention the agreement, but the certificate was imperfect, that is, insufficient

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to satisfy the requirements of s. 258 of the Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist. This is not a sufficient compliance with the provisions of s. 258, and therefore, without deciding what was the intention expressed by the agreement, I hold that the certification of the adjustment was inadequate, and that we cannot recognise it in executing the decree. This question leaves the parties their mutual rights under the agreement, but in connection with the execution of the decree, I concur in the order passed by my learned brother Oldfield.

Appeal dismissed.

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Before Mr Justice Oldfield and Mr. Justice Mahmood.

JASWANT SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* DIP SINGH AND OTHERS (DECREE-HOLDERS.)*

Reversal of decree—Repayment of money realized—Restitution—Interest—Question for Court executing decree—Fresh suit—Civil Procedure Code, ss. 244, 583.

In a suit for redemption of a mortgage, a decree was passed for possession by redemption on the plaintiff paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt. Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage, and the plaintiff paid the above-mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the amount payable on redemption was reduced to Rs. 22,155. The plaintiff then took out execution of the decree to recover from the defendant the difference between the two sums with interest.

Held that the effect of the appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the appellate Court's decree, and that the question was clearly one for determination by the Court executing the decree, and not by separate suit, being expressly provided for by s. 583 of the Civil Procedure Code.

Held also that the decree-holder was entitled to restitution of the amount with interest.

Roger v. *The Comptoir d'Escompte de Paris* (1) referred to. *Ram Ghulam* v. *Dwarka Rai* (2) distinguished by MAHMOOD, J.

The facts of this case are stated sufficiently for the purposes of this report in the judgment of Oldfield, J.

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* First Appeal No. 41 of 1884, from an order of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 29th March, 1884.

(1) L. R. 3 P. C. 465. (2) *Ante*, p. 170.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Ajudhia Nath* and Pandit *Nand Lal*, for the respondents.

OLDFIELD, J.—The respondent instituted a suit against the appellant for redemption of a mortgage. A decree was made for possession by redemption on the respondent paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt. Prior to institution of the suit, the appellant had taken proceedings to foreclose in the Judge's Court under the Regulation, and the respondent paid the above sum into that Court for the appellant, who took it out. The respondent instituted an appeal in this Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the debt payable on redemption was reduced to Rs. 22,155. The respondent then took out execution of the decree to recover from the appellant the difference between the two sums with interest. Execution has been allowed, and the appellant contends in appeal that there was no remedy in the execution department, and interest could not be given. Both objections fail. The matter in dispute is clearly one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge, or satisfaction of the decree, under s. 244, Civil Procedure Code.

The payment was directed by the decree of the first Court, and was made under it, and the effect of the appellate Court's decree was to direct restitution of any sum paid under the first Court's decree, which was disallowed by the appellate Court's decree, and the question was clearly one for determination by the Court executing the decree, and not by separate suit, and is expressly provided for by s. 583. Further, the decree-holder-respondent was entitled to restitution of the amount with interest. On both these points the case of *Roger* v. *The Comptoir d' Escompte de Paris* (1) is an authority in support of the view here taken. The appeal is dismissed with costs.

MAHMOOD, J.—I am of the same opinion, and have only a few words to add. The conclusion arrived at by my brother Oldfield appears to me to be perfectly consistent with the opinion expressed

(1) L. R., 3 P. C. 465.

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by himself and myself in the recent Full Bench case of *Ram Ghulam* v. *Dwarka Rai* (1). The learned Chief Justice gave expression, in his judgment, to certain opinions which I did not altogether adopt, and for that reason I delivered a separate judgment. To prevent that judgment from being misunderstood, I may say that what distinguished my opinion from that of the Chief Justice was, that I held that the mesne profits which were the subject matter in litigation in that case were not realized in execution of the decree or of any mandate therein, and that the matter could therefore be litigated again, and that such subsequent litigation was not barred by s. 244 of the Code. But in this case the circumstances leave no doubt that a surplus of Rs. 21,470-7-0 was realized over and above what should have been realized by the decree-holder, and was therefore a payment made strictly under the decree, and that distinguishes the present case from *Ram Ghulam* v. *Dwarka Rai*. Again, s. 583 of the Code provides that "when a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits." It appears to me that the present case depends upon the meaning which we are to attach to the words "by way of restitution or otherwise," and this meaning has, as my brother Oldfield has observed, been explained by their Lordships of the Privy Council in *Roger* v. *The Comptoir d' Escompte de Paris* (2). I am anxious to incorporate the passage in which their Lordships deal with this question in my own judgment, in order that it may be made accessible to the Mufassal Courts, which seldom possess copies of the Privy Council reports. It is as follows:—

"It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury—and very grave injury—will be done to the petitioners. They will, by reason of an act of the Court, have

(1) *Ante*, p. 170. (2) L. R. 3 P. C. 465.

paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and wrongfully obtained possession of the money under a judgment which has been reversed. So far, therefore, as principal is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.

"It is said, however, that there is no authority for ordering the payment of interest. The cases of writs of error which have been referred to can hardly be considered as precedents for a case of the present kind. The proceeding upon them was of a highly technical character. It was a matter of great rarity for a writ of error not to suspend execution in any case, where execution had not actually taken place before the writ of error was brought. Restitution no doubt was ordered, and it may well be that under the term 'restitution,' in the case of a money payment, interest was not given by the Court which carried the restitution into effect. But whether that be so or not, their Lordships do not think it necessary to inquire further into that matter. Upon proceedings which are much more analogous to the present, undoubtedly interest has been given. One case has been mentioned in the House of Lords, the case of *Blake* v. *Mowatt*, in which money, which had been ordered to be paid under a decree-money consisting itself of principal and interest—that decree having been reversed in the House of Lords—was ordered by the Court below to be restored, together with interest upon the capital sum. It probably would be found that that case is by no means a solitary case in the practice of the House of Lords. Their Lordships have reason to believe that the practice of the Courts in India, when there has been a reversal in this country, and when money has

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been ordered in India to be paid back in consequence of that reversal, is to order the payment of interest. Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found to be in favour of a restitution of the money with interest. They are quite satisfied that this practice is in accordance with the true principle to be applied to this case and with what the justice of such a case demands, and they think that it is pre-eminently so in a case in which the money, in the first instance, was ordered to be paid by the defendants in the action, with interest, during the time that the money had been in the defendant's possession after the conversion of the goods."

I have no more to say except that I concur in the order passed by my learned brother Oldfield.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

1885 *February* 23.

NIDHI LAL (DEFENDANT) *v.* MAZHAR HUSAIN AND OTHERS (PLAINTIFFS)*.

Mortgage—Transfer of mortgaged property by mortgagee in exchange for similar property—Right of mortgagor to property acquired by exchange.

In 1865, *N* was in possession of six shops in a market-place at Etawah. He was in possession of two as mortgagee, and of the remaining four as proprietor. The Municipal Committee of Etawah, having decided to establish the market in a fresh place, and to use the site of the old market for other purposes, arranged with *N* to take the sites of his six shops in the old market-place, and to give him in lieu of them sites for six shops in the new. Under this arrangement, he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage-money and cost of constructing the shop.

Held that the claim could not be allowed, inasmuch as it could be justified only by proof of an agreement binding upon the parties at the time when the transaction occurred that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made.

THE facts of this case were as follows:—In 1865 the defendant in this suit, Nidhi Lal, was in possession of six shops in a market-

* Second Appeal No. 1176 of 1883, from a decree of F. E. Elliot, Esq., District Judge of Mainpuri, dated the 17th May, 1883, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th January, 1883.

place at Etawah called Humeganj. He was in possession of two as mortgagee, and of the remaining four as proprietor. One of the mortgaged shops was held by him under a usufructuary mortgage from one Muhammad Husain, through whom the plaintiffs in this suit claimed. In that year the Municipal Committee of Etawah, having decided to establish the market in a fresh place, and to use the site of the old market for other purposes, arranged, among other persons, with the defendant, to take the sites of his six shops in the old market-place, which he valued at Rs. 50 each or Rs. 300 in all, and to give him sites for six shops in the new market-place, valued at the same amount, and Rs. 50 for materials of each shop. Under this arrangement the defendant built himself six shops in the new market place in lieu of his six shops in the old one.

The plaintiffs in this suit, as the representatives of Muhammad Husain, claimed possession of one of these six new shops on payment of the mortgage-money, and cost of constructing the shop. The Court of first instance gave them a decree, which, on appeal by the defendant, the lower appellate Court affirmed.

The defendant appealed to the High Court, the fourth ground of appeal being as follows:—"That the plaintiffs cannot be considered to be the owners of the shop in question, and the new shop cannot be substituted for the old one."

Pandit *Ajudhia Nath* and Babu *Baroda Prasad Ghose*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the respondents.

PETHERAM, C. J.—I think that this appeal must be allowed. The action is brought by persons who stand in the position of mortgagors against a mortgagee, and its object is the redemption of the mortgage. The facts are that, in 1863, the ancestor of the plaintiffs was in possession of three shops in the old market-place of Etawah, and that one of these was given under a usufructuary mortgage to the defendant, Nidhi Lal, to secure a debt of the value of Rs. 75, and it was agreed that the mortgagee should get the rent of the shop by way of interest. This was the state of things existing in 1865, when the Municipality elected to destroy the old

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market and to build a new one, and, under these circumstances, it was necessary to compensate the owners of the shops which were destroyed, and it was arranged that the Municipality should purchase the shops before-mentioned from the mortgagee in possession, and give him for it Rs. 50 in cash, as half of the price, and, as representing the other half, a site for another shop in the new market. It was apparently arranged between the mortgagor and the mortgagee that they should join in transferring the old site to the Municipality. The mortgagee received the Rs. 50 in cash, and obtained possession of six shops in the new market. The representative of the mortgagor now brings the present suit, in which he claims to obtain possession by redemption of one of these six shops upon payment of Rs. 275, this sum including Rs. 75 on account of the mortgage-debt, and Rs. 200 on account of expenses incurred by the mortgagee in re-constructing the mortgaged property.

I hold that, upon the facts which I have stated, no real inference of law arises, and I know of no authority and of no principle of law which could justify the contrary opinion.

If any such inference did arise, it could only do so from some agreement binding upon the parties at the time when the transaction occurred; that is, an agreement that one of the new shops should take the place of the old one, which was the subject of the mortgage. But neither the Court of first instance nor the lower appellate Court has found that any agreement of the kind in fact was made. It has been suggested that we should remit an issue for the ascertainment of the question. But I do not think that we ought to do so. It would afford a temptation to the parties to concoct a case, and, if they did so, any finding arrived at by the Court below would be contrary to the evidence. It would be necessary for the Court to find that there was an agreement substituting, not merely some one of the six new shops for the old one, but some specific shop for it; because a mortgagor cannot claim to redeem a property which is uncertain. He must know what it is that he desires to redeem; and I regard this case as a mere vague attempt by the mortgagor to get hold of some shop or other, without knowing or caring which one out of the six it is to be. I am

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therefore of opinion that the appeal should be decreed, the decrees of the Courts below reversed, and the suit consequently dismissed with costs.

STRAIGHT, J.—I am of the same opinion.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

1885 *February* 24.

JAWAHIR SINGH (JUDGMENT-DEBTOR) *v.* JADU NATH AND OTHERS (DECREE-HOLDERS).*

Execution of decree—Order for sale—Application for execution struck off—Application for restoration—Finality of order.

A decree for money was passed on the 19th March, 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December, 1878. On this application an order was made by the Court executing the decree (Munsif) for the sale of certain property belonging to the judgment-debtor. The latter objected to execution of the decree, on the ground of limitation, and the decree-holders filed an answer to the objection. On the 14th July, 1879, the case was struck off, because the decree-holder had not deposited certain process-fees, without the disposal of the objection. On the 1st October, 1879, the decree-holders again applied for the sale of the property, and it was ordered to be sold. On the 17th February the judgment-debtor presented a petition repeating the objection, which on the 13th March, 1880, the Munsif entertained and disallowed. This order was affirmed in appeal by the District Judge, and again by the High Court. Meanwhile the Munsif had struck off the case from the file of execution-cases pending in his Court, on the ground that the records had been despatched to the Appellate Court. On the 18th September, 1882, the decree-holder again applied for execution of the decree, praying that "the suit might be restored to its number, and that the judgment debt might be caused to be realized by attachment and sale of the judgment-debtor's property specified in the former schedule."

Held that the decree-holder was entitled to execution of the decree, and that he could get it under the application which was made on the 1st October, 1879, inasmuch as the matter was made *res judicata* by the decree of the High Court in appeal, and it must be taken that that decree was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place.

Held also that the proper application for the decree-holder to have made in September, 1882, was that the case might be restored to the Munsif, and that the present application might be so dealt with as to effect the same result, because the prayer contained therein referred to the number of the proceedings of October, 1879, and to the schedule of the property then ordered to be sold.

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* Second Appeal No. 93 of 1884, from an order of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 6th May, 1884, reversing an order of Maulvi Abdul Razaq, Munsif of Basti, dated the 18th September, 1883.

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THE decree of which execution was sought in this case was one for money, bearing date the 19th March, 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December, 1878. On this application an order was made by the Court executing the decree (Munsif of Basti) for the sale of certain property belonging to the judgment-debtors. On the 21st February, 1879, the judgment-debtor objected to the execution of the decree on the ground of limitation. On the 21st February, 1879, in obedience to an order of the Munsif, the decree-holders filed an answer to the judgment-debtor's objection. On the 14th July, 1879, the case was struck off, because the decree-holders had not deposited certain process-fees, without the disposal of the judgment-debtor's objection. On the 1st October, 1879, the decree-holders again applied for the sale of the property, and it was eventually ordered to be sold on the 20th March, 1880. On the 17th February, 1880, the judgment-debtor preferred a petition to the Munsif, in which he complained that his objection to the execution of the decree, dated the 21st February, 1879, on the ground of limitation, had not been disposed of, and prayed that the Court would dispose of the same. On this application the Munsif ordered the decree-holders to file an answer to the judgment-debtor's objection. On the 2nd March, 1880, the decree-holders filed a petition, in which they stated that they had already filed an answer. Eventually, on the 13th of March, 1880, the Munsif entertained the judgment-debtor's objection, and disallowed it. The judgment-debtor appealed to the District Judge of Gorakhpur from the Munsif's order, who, on the 9th November, 1880, affirmed it. In the meantime the Munsif had struck off the case from the file of execution-cases pending in his Court, on the ground that the records had been despatched to the appellate Court. On the 19th April, 1881, the second appeal preferred by the judgment-debtor to the High Court, from the District Judge's appellate order, was dismissed, and the latter order was affirmed.

On the 18th September, 1882, the decree-holders again applied to the Munsif for execution of the decree. They prayed in this application that "the suit may be restored to its number, and that the judgment-debt may be caused to be realized by attachment

and sale of the judgment-debtor's property specified in the former schedule."

The Munsif rejected this application on the 18th September, 1883, on the ground that the decree was more than twelve years' old, and therefore, under s. 230 of the Civil Procedure Code, execution could not be allowed. It appeared that at the time the application was preferred the records of the case had not been returned to the Munsif's office, and that they were not returned to it till some time subsequently in 1883.

On appeal by the decree-holders the lower appellate Court (Subordinate Judge of Gorakhpur) was of opinion that the application should be allowed, as the decree-holders had applied within the period of three years' grace allowed by Act X of 1877 for execution, and had been prevented from prosecuting that application, not by reason of any default of their own, but by reason of the appeal preferred by the judgment-debtor and the removal of the case from his files by the Munsif.

The judgment-debtor appealed to the High Court.

Munshi *Sukh Ram* and Lala *Lalta Prasad*, for the appellant.

Munshi *Kashi Prasad* and Maulvi *Mehdi Hasan*, for the respondents.

PETHERAM, C. J.—I think the decree-holder is entitled to execution of his decree, and that he can get it under the application which was made on the 1st October, 1879. It is possible that a difficulty may then arise as to whether he is entitled to make a second application for execution within the three years allowed to him under s. 230 of the Civil Procedure Code, the first application having been made in 1878. But that point does not really arise now, because to my mind the question is, whether execution can now be had under the proceedings of the 1st October, 1879. The decision then arrived at appears to me to make the matter *res judicata*, because the same issue was decided by the Court, and between the same parties. The decree was passed by this Court in appeal, and we are bound to consider that it was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place. The appeal was decided in

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April, 1881, and then the matter seems to have slept. The Munsif's file was apparently over-laden, and the case was transferred from his file to that of the District Judge, who does not appear to have taken any action in the matter. The proper application for the decree-holder to have made in September, 1882, was, that the case might be restored by the Munsif. The only question we have now to consider is, whether the present application can be so dealt with as to meet this state of things.

I think that it can, because the prayer contained in the application is, "that the suit may be restored to its number, and that the judgment-debt may be caused to be realized by attachment and sale of the debtor's property specified in the former schedule of property." Now the "number" here referred to is the number of the proceedings of October, 1879, and the "schedule of property" means the schedule of the property then ordered to be sold. Under the circumstances, I think that the appeal should be dismissed with costs, but that the order should be modified by making it an order to the Munsif to restore the proceedings of the 1st October, 1879, to his file, and to proceed to levy the debt under that order.

STRAIGHT, J.—I am of the same opinion.

Appeal dismissed.

1885 *February* 26.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

THAMMAN SINGH (PLAINTIFF) *v.* JAMAL-UD-DIN AND OTHERS (DEFENDANTS)*

Pre-emption—Partition of property sold on application of vendee—Silence of pre-emptor—Waiver—Estoppel.

Subsequently to the sale of a one-third share in a village, the vendee applied for partition of the share. A co-sharer, who had a right of pre-emption in respect of the sale, made no objection to this application, and the partition was effected. The co-sharer afterwards set up a claim to pre-emption.

Held that there was nothing in the conduct of the pre-emptor which could amount to estoppel, or to a waiver of his right of pre-emption.

Motee Sah v. *Goklee* (1) distinguished and dissented from, and *Bhairon Singh* v. *Lalman* (2) referred to by MAHMOOD, J.

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* Second Appeal No. 476 of 1884, from a decree of T.B. Tracy, Esq. Offg. District Judge of Bareilly, dated the 15th January, 1884, affirming a decree of Maulvi Muhammad Abdul Qaiyum, Subordinate Judge of Bareilly, dated the 19th September, 1883

(1) N.-W. P. S. D. A. Rep., 1861, p. 506. (2) Weekly Notes, 1884, p. 216.

THE claim in this suit was to enforce the right of pre-emption in respect of the sale of a one-third share of a village to the respondent, Jamal-ud din, under a deed dated the 14th August, 1882. This claim was founded on the *wajib-ul-arz*. It appeared that there were three equal shares in this village, one belonging to the plaintiffs, one to one Jawahir Lal, and one the subject of this suit. This last mentioned share, at the time of sale, was in the possession of the respondent, Jamal-ud-din, the vendee, under a mortgage. After the sale to the respondent, Jawahir Lal applied for the partition of his one-third share. In the course of the proceedings which followed this application, the respondent applied for the partition also of the share which he had purchased. It further appeared that the plaintiff did not object to this application on the ground that he had a right of pre-emption, and the partition was effected. The lower Courts both held that the plaintiff was estopped by his conduct from suing to enforce his right of pre-emption. Upon this point the Court of first instance observed as follows:— "In my opinion, though it was useless to raise the objection, or to assert the right of pre-emption in the Revenue Court, as the plaintiff, in consequence of the possession of the defendant-vendee and mortgagee, could not prevent the partition, and could not, except through the medium of the Civil Court, obtain the property by asserting the right of pre-emption, yet it has been clearly held in the case of *Motee Sah* v. *Goklee* (1), on the authority of some other precedents (and no adverse ruling of a subsequent date has been found in the Indian Law Reports), that a pre-emptor, who has not preferred an objection to the partition, and who has not brought a suit prior to the partition, will be considered to have relinquished his right of pre-emption. In the present case, after the application of Jawahir Lal, the partition of the property sold and claimed by pre-emption was also effected in the course of the same partition suit, at the instance of the vendee, with the knowledge, nay, with the written consent, of the plaintiff; and therefore his right should, as is laid down in the precedent quoted above, be considered to have been extinguished.— *Vide* the plaintiff's application, dated the 13th July, 1883, which shows his knowledge and consent." Upon the same point, the lower appellate Court observed

(1) N.-W. P. S. D. A. Rep., 1861, p. 506.

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as follows :—"It is perfectly clear that the plaintiff-appellant was all along aware that the defendant-respondent was a party to the partition. It is immaterial that the partition case was originally instituted by one Jawahir Lal, another co-sharer. It was open to the plaintiff-appellant to have urged his pre-emptive claim by way of objection under s. 113 of Act XIX of 1873, but as he failed to do this, and allowed the respondent (vendee) to incur all the trouble and expense attendant on partition proceedings, he must, in accordance with the ruling cited by the lower Court, be held to have waived his claim."

In this second appeal by the plaintiff, it was contended on his behalf that there was nothing in his conduct in respect to the partition proceedings which constituted waiver of his right of pre-emption or estoppel.

Mr. *T. Conlan* and Pandit *Bishambhar Nath*, for the appellant.

Mr. *Amir-ud-din*, for the respondent Jamal-ud-din Khan.

OLDFIELD, J.—There is nothing in the conduct of the plaintiff during the partition proceedings which can amount to estoppel or to waiver of the exercise of his right of pre-emption. The decree of the lower appellate Court is set aside, and the case remanded to the lower appellate Court for disposal on the merits. Costs to abide the result.

MAHMOOD, J.—I am of the same opinion as my learned brother Oldfield, and I wish only to refer to two cases which were cited by the learned counsel for the respondent in support of his client. One of these cases is *Motee Sah* v. *Goklee* (1). I do not regard that case as by any means on all fours with the present, and I wish to say that I do not accept the rule of law as to acquiescence or estoppel which was there laid down, and from which I have already expressed my dissent upon a former occasion. The other case cited by Mr. Amir-ud-din was that of *Bhairon Singh* v. *Lalman* (2) and the passage in that case to which the learned counsel referred was as follows :—

"The single question for our determination is whether, after having notice of the intended sale to the respondent-vendee, the appellant's conduct was such as to warrant the inference that he,

(1) N.-W. P. S D. A. Rep, 1861, p. 506. (2) Weekly Notes, 1884, p. 216.

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either expressly or impliedly, acquiesced in or relinquished his claim to pre-emption. It is found by the Judge that he made no communication whatever to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the Rs. 4,000, because it was not the condition agreed on between the vendor and the vendee."

The rule laid down in that case was, that the pre-emptor may be estopped by conduct amounting to an admission before the sale occurs which is the basis of the exercise of the pre-emptive right. The report does not, of course, enter fully into the peculiar circumstances of the case ; but if I thought that the decision bore the interpretation placed upon it by Mr. Amir-ud-din, I should be unable to concur in it,—an interpretation which could not be reconciled with the ruling of the same learned Judge in the case of *Subhagi* v. *Muhammad Ishak* (1). I agree in the order passed by my learned brother Oldfield.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1885 *March* 3.

SUKRIT NARAIN LAL (JUDGMENT-DEBTOR) *v.* RAGHUNATH SAHAI (DECREE-HOLDER). *

Insolvent judgment-debtor—Civil Procedure Code, s. 351 (*b*)—" *Property* "—*Fraudulent intent.*

S 351 (*b*) of the Civil Procedure Code contemplates a case of active concealment, transfer, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division ; and it does not cover an omission by the judgment debtor, in his application for a declaration of insolvency, of a statement as to his right to demand partition of ancestral estate in which he is a sharer, especially where there is no evidence of any intent to defraud.

THIS was an appeal from an order under s. 351 of the Civil Procedure Code, refusing to declare the appellant an insolvent. The facts of the case are stated in the judgment of Straight, J.

Munshi *Kashi Prasad*, for the appellant.

Munshi *Sukh Ram*, for the respondent.

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* First Appeal No. 140 of 1884, from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 1st August, 1884

(1) I. L. R., 6 All., 463.

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STRAIGHT, J.—It appears to me that the Judge was wrong. The applicant in this case was arrested in execution of a decree for Rs. 263-4-0, and, no doubt, as my brother Brodhurst has suggested, it is extraordinary, considering the well-to-do relatives that he has, that the amount due under so small a decree has not been satisfied. But, after all, we have only to do with his own position as an imprisoned debtor seeking the protection of the Court, and to see whether the Judge was warranted in refusing his application to be declared an insolvent. He seems to be one of the three sons of a Hindu father, who, jointly with his two brothers and himself, holds ten ancestral villages in the Gorakhpur district, in which villages the appellant has at any time a right to demand a partition of his share, which right, it has been held, can pass by execution-sale to an auction-purchaser.

The value of this right must necessarily be to a certain extent doubtful, and I cannot say that, because the appellant did not disclose it in his application, he should be regarded as guilty of bad faith in respect thereof. The Judge was mistaken in supposing that such a case came within s. 351 (*b*) of the Civil Procedure Code. That does not contemplate such a case as this, but one of an active concealment, transfer or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division. It does not seem to me to cover an omission by the judgment-debtor in his application for a declaration of insolvency of a statement as to his right to demand partition of ancestral estate in which he is a sharer, and certainly not where, as in the present case, there is no evidence of any intent to defraud. Under the circumstances, our order will be that the appeal is allowed, and, reversing the refusal of the Judge to entertain the petition, we direct him to restore the case to his file, and to dispose of it according to law.

BRODHURST, J.—I concur.

Appeal allowed.

1885
March 4.

Before Mr. Justice Straight and Mr Justice Brodhurst.

HABIBULLAH (PLAINTIFF) *v.* KUNJI MAL (DEFENDANT) *

Partition of Mahal—Jurisdiction—Civil Courts—Act XIX of 1873 (*N.-W. P. Land Revenue Act*), *s.* 241 (*f*).

B, the recorded proprietor of a 7 biswas 10 biswansis share in a village, the recorded area of which was 476 bighas and 5 biswas, purchased a 16 biswansis and 13½ kachwansis share in the same village. In 1872, at the time of settlement, *B* was recorded as the proprietor of an 8 biswas 6 biswansis and 13½ kachwansis share, and the area of this was recorded as 476 bighas and 5 biswas, that is to say, the same area as was recorded before the purchase. In 1876, *H* purchased *B's* rights and interests in the village, and in 1877 applied for partition of the share of which he had been recorded proprietor, and the same was partitioned, an area of 476 bighas and 5 biswas being allotted to him. Subsequently he brought a suit against the proprietors of the other estates into which the village had been divided, for 61 bighas 4 biswas and 8 biswansis of land, alleging that, at the settlement of 1872, the area of *B's* rights and interests had been erroneously recorded as only 476 bighas and 5 biswas.

Held that the suit would not lie in the Civil Court, being barred by the provisions of s. 241 (*f*) of the N.-W. P. Land-Revenue Act (XIX of 1873).

ONE Mrs. Berkeley, the recorded proprietor of a 7 biswas and 10 biswansis patti of a village, purchased a 16 biswansis and 13½ kachwansis share in the village, belonging to one Gulab Singh, situated in another patti of the village called patti Guman Singh. At the time of this purchase the recorded area of Mrs. Berkeley's 7 biswas and 10 biswansis patti was 476 bighas and 5 biswas; and the recorded area of Gulab Singh's share was 61 bighas, 4 biswas, and 8 biswansis. In 1872, at the time of settlement, Mrs. Berkeley was recorded as the proprietor of an 8 biswas, 6 biswansis, and 13½ kachwansis share of the village, and the area of her share was recorded as 476 bighas and 5 biswas; that is to say, the area which was recorded before her purchase of Gulab Singh's share. In 1876 the plaintiff in this suit purchased Mrs. Berkeley's rights and interests in the village. In 1877 the plaintiff applied for the partition of Mrs. Berkeley's 8 biswas 6 biswansis and 13½ kachwansis share, of which he had been recorded proprietor, and the same was partitioned, an area of 476 bighas and 5 biswas being allotted to the plaintiff. In 1882, the plaintiff brought the present suit against the proprietors of the other estates into which the

* Second Appeal No 342 of 1884, from a decree of T. B. Tracy, Esq, Offg. District Judge of Bareilly, dated the 22nd December, 1883, reversing a decree of Babu Nilmadhab Banarji, Munsif of Haveli, Bareilly, dated the 21st August, 1883.

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village had been divided for 61 bighas 4 biswas and 8 biswansis of land as the area of Gulab Singh's 16 biswansis and 13½ kachwansis share of patti Guman Singh, alleging that at the settlement of 1872 the area of Mrs. Berkeley's rights and interests in the village had been erroneously recorded as only 476 bighas and 5 biswas. The suit was originally dismissed by the Court of first instance on the ground that the jurisdiction of the Civil Courts in respect of its subject-matter was barred by s. 241 (*f*) of Act XIX of 1873 (N.-W. P. Land-Revenue Act). On appeal by the plaintiff the then Judge of the lower appellate Court held that the cognizance of the suit by the Civil Courts was not barred by that section, and remanded the case for re-trial. On appeal by the defendants to the High Court from the order of remand, Straight and Brodhurst, JJ., affirmed that order. The Court of first instance re-tried the case, and decreed the claim against the defendants jointly. On appeal by Kunji Mal, defendant, the proprietor of one of the other estates into which the village had been divided, the then Judge of the lower appellate Court held that the suit was bad for many reasons; among others, because it was really an objection to the allotment of area at partition, and dismissed the suit.

The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondent.

STRAIGHT, J.—In saying what I am about to say about this appeal, I think it right to remark that my brother Brodhurst, at the hearing of the original appeal that came up before us as an appeal from an order of remand, was inclined to take a view contrary to that which was ultimately expressed in our former order. He was indisposed, after consideration, on the materials then before us, to record a formal difference of opinion, and preferred to join with me in ruling that the suit did lie in the Civil Court. The effect of our order, as then made, was to remand the case, but it must be taken to have been passed solely in advertence to the materials then before us. The result of this remand is, that we have now a quantity of matter and information that was not available on the former occasion for consideration. It appears that in 1872 Mrs. Berkeley's

name was recorded in respect of a 7 biswas 10 biswansis share, the area of which, as shown in the revenue papers, was 476 bighas, 5 biswas. She subsequently purchased a 16 biswansis 13½ kachwansis share from one Gulab Singh in patti Guman Singh, the area of which share was recorded as 61 bighas 4 biswas 8 biswansis. So that in 1876, when the plaintiff purchased the rights and interests of Mrs. Berkeley, he would appear to have been *primâ facie* entitled to 476 bighas 5 biswas, *plus* 61 bighas 4 biswas, 8 biswansis. At the partition in 1877 the share of the plaintiff was recorded as 8 biswas 6 biswansis and 13½ kachwansis, and the area appertaining to this share was still recorded as 476 bighas 5 biswas. From this it would appear that, on the face of it, there was a deficiency of 60 and odd bighas in the plaintiff's share; but, as the learned Pandit who appeared for the respondent has very properly remarked, the areas which are recorded at the settlement as pertaining to a particular fractional share are more or less approximate, and it is only when a partition is being carried out that the proportion of area to fractional shares can be ascertained with anything like accuracy. In the present case, it may well have been that 476 bighas 5 biswas fairly represented the proportion of area to which the 8 biswas 6 biswansis and 13½ kachwansis share was entitled out of the whole area.

The question then substantially raised by the suit is, was the area allotted to plaintiff at the partition in respect of his 8 biswas 6 biswansis and 13½ kachwansis share a reasonable distribution?

Now under s. 241 of Act XIX of 1873, cl. (*f*), the distribution of the land or allotment of the revenue of a mahal by partition are matters over which the Civil Courts are forbidden to exercise any jurisdiction, and this is virtually what this suit invites us to do. Upon the fuller materials now before us, I feel myself constrained to hold that the suit does not lie in the Civil Court, being barred by the provisions of s. 241 of the Revenue Act, and I would dismiss the appeal with costs.

BRODHURST, J., concurred.

Appeal dismissed.

1885
March 4.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

RAGHUBAR DAYAL (DEFENDANT) *v.* ILAHI BAKHSH AND ANOTHER (PLAINTIFFS)*

Execution of decree—Decree for sale of mortgaged property and for costs—Attachment and sale of other property for whole amount of decree—Suit to set aside execution-sale—Civil Procedure Code, ss. 311, 312—Finality of order in execution-proceedings.

In execution of a decree on a mortgage-bond, for the sale of the mortgaged property, and for the costs of the suit, amounting to Rs. 1,000, certain houses were attached, on the 30th September, 1881, which were not part of the mortgaged property. On an objection raised by the judgment-debtors, that the decree was by its terms executable only against the mortgaged property, the High Court in appeal decided, on the 6th September, 1882, that the houses were not liable to attachment and sale under the decree. In the meantime, on the 15th June, 1882, the houses had been put up for sale, and purchased for Rs. 500, and the sale had been confirmed on the 16th August, 1882. The judgment-debtors brought a suit against the purchaser to set aside the sale, on the ground that the houses were not saleable under the decree.

Held that the decree, in regard to costs, was a decree made personal against the judgment-debtor, and conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against the property mortgaged in the bond, but also against the person and other property of the judgment-debtor.

Per OLDFIELD, J. (MAHMOOD, J., doubting) that the attachment and sale in execution of the decree were valid, inasmuch as they were made in respect of the costs as well of the principal and interest decreed.

Per MAHMOOD, J., that the suit was maintainable, and was not barred by any plea *in limine*. *Abdul Haye* v. *Nawab Roj* (1) referred to.

Also *per* MAHMOOD, J., that inasmuch as the adjudication of the 6th September, 1882, was one between the judgment-debtors on the one hand and the decree-holder on the other, and subsequent not only to the sale but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide anything in relation to the nature of the decree as to costs, the order then passed could not be used against the purchaser.

Also *per* MAHMOOD, J., that it was doubtful whether, the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself, were valid; but that everything that was said against those proceedings constituted matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale; and that therefore, even assuming that the sale

* Second Appeal No. 477 of 1884, from a decree of Maulvi Muhammad Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 4th December, 1883, affirming a decree of Babu Nilmadhab Banarji, Munsif of Haveli, Bareilly, dated the 26th June, 1883.

(1) B. L. R. Sup. Vol., 911.

and confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale, within the meaning of s. 311, a suit like the present, upon that ground, alone was prohibited by the last part of s. 312.

THE plaintiffs in this suit claimed to set aside an execution-sale. It appeared that on the 24th June, 1880, one Jugal Kishore, represented by the defendant in this suit, obtained a decree against the plaintiffs on a mortgage-bond, for the sale of the mortgaged property, and for the costs of the suit. The decree-holder applied for execution of the decree, by the attachment and sale of two houses, belonging to the plaintiffs, which were not part of the mortgaged property. The houses were attached on the 30th September, 1881. The plaintiffs objected to the attachment on the ground that the decree was, by its terms, executable only against the mortgaged property. This objection was disallowed by an order dated the 29th March, 1882. The plaintiffs appealed from this order to the High Court, which, on the 6th September, 1882, decided that the houses were not liable to attachment and sale under the decree, as it confined the relief to the sale of the mortgaged property. In the meantime, on the 15th June, 1882, the houses had been put up for sale, and had been purchased by the defendant for Rs. 500, and the sale had been confirmed on the 16th August, 1882. The plaintiffs brought the present suit against the defendant to set aside the sale on the ground that the houses were not saleable under the decree.

The Court of first instance gave the plaintiffs a decree, which, on appeal by the defendant, the lower appellate Court affirmed.

In second appeal by the defendant it was contended on his behalf that the sale had been improperly declared invalid, inasmuch as it had taken place in satisfaction not merely of the mortgage-debt, but also of the costs of the suit, for which the decree made the judgment-debtors personally liable.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambar Nath*, for the respondents.

OLDFIELD, J. (After stating the facts, continued:—) The appeal must, in my opinion, prevail. The decree-holder's relief under his decree for the recovery of the principal amount of the debt with

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interest, *viz*, Rs. 11,583-0-9, was confined to its recovery by sale of the property of the judgment-debtors mortgaged in the bond; but the decree further ordered that the costs of the decree-holder, Rs. 1,034-12-0, were to be recovered from the judgment-debtors, and this sum was recoverable from other property besides the mortgaged property. The attachment and sale were made in respect of the costs as well as of the principal and interest decreed, and the objections, therefore, that there was no right under the decree to sell the property in suit, and that the sale is void, in consequence, must fail.

I would on this ground decree the appeal, and set aside the decrees of the lower Courts, and dismiss the suit with all costs.

MAHMOOD, J.—I am of the same opinion, but wish to state briefly the reasons which have brought me to it. The facts have been stated by my learned brother Oldfield, and it is unnecessary for me to refer to them further than is unavoidable for the purpose of elucidating my conclusions. The whole question before us, and indeed the only question raised by the learned Junior Government Pleader on behalf of the appellant, is whether the auction-sale of the 15th June, 1882, conveyed any such title to the present defendant as would preclude such a suit as this. The first point for consideration is the nature of the suit, and it is obvious from the plaint that it is one for declaration of title, and to set aside the sale of 15th June, 1882. Such a suit could only be maintained by showing that the sale was invalid, and hence it is necessary to consider any circumstances rendering the two houses now in suit not subject to the decree in execution of which they were sold. There has been much able argument by the learned Junior Government Pleader upon the question whether the suit is maintainable, and the learned Pandit, on behalf of the respondents, has maintained—what indeed, the Junior Government Pleader conceded—that such a suit would lie under certain circumstances. There are many cases on this subject, referred to in s. 312 of Mr. Justice O'Kinealy's edition of the Civil Procedure Code, which fully go to maintain this proposition of law; and in particular the Full Bench case of *Abdul Haye* v. *Nawab Raj* (1). I have therefore no doubt that the suit would lie, and is not barred by any plea *in limine*. And then a two-fold question

(1) B. L. R. Sup. Vol., 911.

arises. In the first place, what is the meaning of the decree in execution of which the houses were sold? In interpreting this decree, I must refer to the order of this Court, dated the 6th September, 1882, upon which the lower Courts have relied for the purpose of holding that the decree was limited to such rights of the defendant-judgment-debtor in that suit as existed in the property hypothecated in the bond upon which the decree was passed. It is clear to me that that adjudication, being one between the judgment-debtor on the one hand and the decree-holder on the other, and having been subsequent not only to the sale, but to the confirmation of the sale, cannot be binding upon the auction-purchaser, the present appellant. In the next place, my learned brother Tyrrell and I, who passed the order of the 6th September, 1882, had before us two questions only which were raised in that case on behalf of the appellant-judgment-debtor, and the respondent-decree-holder was wholly unrepresented, and we were not then called upon to decide anything in relation to questions of the nature of the decree as to costs. I am therefore of opinion that that order cannot now be used against the present appellant.

We have now to consider what was the meaning of the decree, and my interpretation of that meaning is the same as that of my learned brother Oldfield, namely, that, in regard to costs, it was a decree made personal against the judgment-debtor: in other words, it conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against the property hypothecated in the bond which was the basis of the suit, but also against the person and the other property of the judgment-debtor. I limit this observation to the order of the Court in regard to costs. What happened was, that a decree was passed having this double aspect, that it was so executed that not only the hypothecated property but these two houses also were attached, and in execution they were sold for about Rs. 500, the amount of costs being over Rs. 1,000. The question then is, whether such attachment and such proclamation of sale and the sale itself were or were not valid? There can be no doubt that if the decree-holder had taken out execution as to costs against the judgment-debtor in respect of the two houses, that would have been valid; and the only doubtful point is whether, the attachment having been made for the whole amount

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of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the sale was valid, or *ab initio* void, or voidable, or ineffectual to convey any proprietary rights to the auction-purchaser-appellant. Now I am anxious to say that I am not prepared to lay down that the method adopted by the decree-holder was necessarily regular or proper for the purpose of executing a decree of this nature. But all that is said against the attachment, against the notification of sale, and against the sale itself, constitutes matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale. And therefore, even assuming for the purposes of argument that the sale and the confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale, within the meaning of s. 311, I should still say that a suit like the present, upon that ground alone, is prohibited by the last part of s. 312. Upon these grounds—the only grounds that can be taken on behalf of the plaintiff-respondent—I am of opinion that this suit should have been dismissed. I therefore concur in the order proposed by my learned brother Oldfield.

Appeal allowed.

1885
March 5.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

BARI BAHU AND ANOTHER (DEFENDANTS) *v.* GULAB CHAND (PLAINTIFF.)*

Mortgage—Annulment of settlement—Fresh settlement—Act XIX of 1873 (*Land-Revenue Act*), *ss.* 43, 159, 165.

A settlement of land belonging to *G*, and which he had mortgaged, having been annulled under s 158 of the N.-W. P. Land-Revenue Act (XIX of 1873), the land was farmed by the Collector of the District under s. 159. The revenue having fallen into arrears, the Collector, under the same section, took the land under his own management. Subsequently, under ss. 165 and 43 of the Act, the land was settled with *G's* wife.

Held that the Court was precluded by the terms of s. 241 (*f*) of the Revenue Act from entering into the question whether the settlement was legally made by the Collector with the wife of the mortgagor; that she must therefore be taken to represent such rights and interests as the mortgagor possessed; and that consequently the estate was liable in her hands for the mortgage, and the mortgagee was entitled to claim foreclosure against her.

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* Second Appeal No 19 of 1884, from a decree of J. M. C. Steinbelt, Esq, District Judge of Bánda, dated the 3rd October, 1883, modifying a decree of Munshi Manmohan Lal, Subordinate Judge of Bánda, dated the 6th July, 1883.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Babu *Baroda Prasad Ghose*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the respondent.

OLDFIELD, J.—The plaintiff holds a mortgage with conditional sale from Gurdayal of his one-third share in mauza Dharwan and has brought this suit for foreclosure. It appears that Gurdayal and the shareholders of the other two-thirds of the mauza fell into arrears of revenue, and the Government annulled the settlement under s. 158, Revenue Act, and under s. 159 farmed the mauza to the plaintiff. The plaintiff also appears to have fallen into arrears of revenue, and the Collector, also acting under s. 159, took the mauza under his management. Eventually, as the arrears could not be cleared off by *kham* management, the one-third share of Gurdayal was, under the provisions of ss. 165 and 43, Revenue Act, offered to defendant Bari Bahu, wife of Gurdayal, as representing him. He, it appears, had become a *bairagi*. She satisfied the arrears due, Rs. 908-6-11, and a fresh settlement was made with her. The claim of the plaintiff to foreclose has been resisted by her on the ground that the estate is not liable in her hands for the mortgage made by Gurdayal. Both Courts decreed the claim, and the same plea is now raised in second appeal before us, and is the only ground pressed in appeal.

The plea is invalid. There is no doubt that under s. 159, Revenue Act, so long as a farm or *kham* management continues as to land the settlement of which has been annulled, all contracts made by the persons who immediately before the annulment of the settlement were in possession of the land comprised therein, relating to such lands, are during the term of farm or *kham* management not binding on the Collector of the District, or his agent or lessee; but in the present case the term of farm and *kham* management ceased, and Bari Bahu, the defendant, was put into possession, not as farmer, but as a proprietor with whom a fresh settlement has been made under ss. 165 and 43; and there is nothing in the law by which the contracts made by her predecessor, Gurdayal, are not binding on her, just as they would be on him. The fact that she paid off revenue, or that the original settlement was

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cancelled and a new one made with her for the period of the current settlement, does not relieve her from the obligations of contracts made by her predecessor in title. In this case, if the plaintiff is responsible for any of the arrears which she has satisfied, she may possibly have a claim against him on that account: but on that point I express no opinion ; but she cannot be relieved of the obligation created by the mortgage made by Gurdayal. Whether or not the settlement should have been made with Gurdayal under s. 43 rather than with Bari Bahu does not affect the question before us. She was treated as proprietor, or as representing Gurdayal as his heir, who had by becoming a *bairagi* disassociated himself from affairs, and was treated as civilly dead ; and in either case the estate in her hands is liable for the mortgage made by Gurdayal. The appeal is dismissed with costs.

MAHMOOD, J.—I am of the same opinion ; but as in the course of argument I expressed some doubt as to the view which my brother Oldfield and I now take, I wish to add a few words. It appears that the whole question now is, whether the plaintiff, as holder of a mortgage from Gurdayal, can enforce it in this suit as against Bari Bahu, who is admittedly in possession of the property mortgaged through an arrangement made between her and the Collector of the district in which the property is situated. The question seems to depend upon our knowing the exact legal *status* of this lady in regard to this estate. Having carefully examined the original record of the proceedings by the Collector, after Gurdayal fell into arrears of Government revenue, I have arrived at the same conclusion as my learned brother Oldfield, namely, that his action must be regarded as having been taken in accordance with s. 165 of the Land-Revenue Act (XIX of 1873), read with s. 43 of the same Act. Of course action so taken was one of the measures for which the Legislature provided in s. 150 of the Act, and my difficulty at the hearing was whether the Collector's action, in settling the estate with Bari Babu, was legal. I still entertain considerable doubt, because I am inclined to think that s. 165 of the Revenue Act, read with s. 43, enables the Collector to settle land only with the *proprietor*, that term being by ordinary rules of construction understood as including those who represent him in title. Of course, the case of a mortgage or conditional vendee

—the other persons with whom a settlement may be made,—does not arise here. But this doubt is not a matter with which we are concerned.

It may be that Gurdayal being admittedly still alive, the action of the revenue authorities in treating him as if he was dead and in settling the property with his wife, was illegal. But in this case we are dealing with the matter as a Civil Court, and I therefore agree with my brother Oldfield in holding that the question cannot be adjudicated on by us so far as regards the validity of the settlement made by the Collector. By reason of cl. (*b*) of s. 241 of the Revenue Act, we have no jurisdiction to enter into the merits of the matter, and therefore we must take it that the wife does now represent such rights and interests as Gurdayal possessed, and, in consequence, he is virtually bound by such contracts regarding the property as he made. It is unnecessary for me to remark as to the effect of the circumstance that Gurdayal himself is one of the defendants in the present suit. For these reasons I concur in the order proposed by my brother Oldfield.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

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March 5.

RAM BAKHSH (PLAINTIFF) *v.* PANNA LAL AND ANOTHER (DEFENDANTS)*.

Execution of decree—Application of transferee of decree for execution disallowed—Suit by transferee for decretal amount—Declaratory decree—Civil Procedure Code, ss. 232, 244.

The transferee of a decree for costs, associating with him the transferor, made an application under s. 232 of the Civil Procedure Code, to be allowed to execute the decree. The application was opposed by the judgment-debtor, and was rejected, and the Court referred the transferee to a regular suit. After taking various proceedings ineffectually, he instituted a suit for the recovery of the sum to which he was entitled as costs under the decree transferred to him.

Held that the plaintiff, as the holder of the decree by assignment, could only recover the amount under it by executing the decree, and not by a separate suit; but that he was entitled to have a decree declaring that the assignment to him of the decree-holder's rights under the decree was valid, and gave him a right to execute it, and that the Court's order under s. 232 which disallowed the execution was an improper one, a suit for this relief being maintainable, for, there being no appeal from orders under s. 232, there would otherwise be no remedy; and that, looking at the plaint and the issues on which the parties were divided, and the

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* Second Appeal No. 1622 of 1883, from a decree of Babu Pramoda Charan Banarji, Judge of the Court of Small Causes at Agra, with powers of a Subordinate Judge, dated the 30th June, 1883, reversing a decree of Maulvi Muhammad Fida Husain, Munsif of Agra, dated the 13th December, 1882.

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fact that the Court which refused the plaintiff's application for execution, referred him to a regular suit, this relief might properly be given in the present suit.

Per MAHMOOD, J., that the suit was maintainable, inasmuch as the present plaintiff never having been accepted on the record as holder of the decree, the questions which were disposed of by the Court executing the decree, as between the plaintiff and the judgment-debtor, could not be regarded as questions within s. 244 of the Civil Procedure Code.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Mr. *T. Conlan* and Munshi *Kash Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for the respondents.

OLDFIELD, J.—It appears that the defendants-respondents instituted a suit against Khatta Mal and Kashi Nath on a bond for recovery of money due. They succeeded in the Court of first instance and in the lower appellate Court, but their decree was set aside in appeal by the High Court on the 8th March, 1871, and their suit dismissed, and Khatta Mal and Káshi Nath obtained a decree for their costs. On the 17th March, 1879, Kashi Nath, the sole surviving defendant in that suit, assigned to the plaintiff-appellant before us his right under the decree of the High Court to costs. On the 10th July, 1879, the assignee (*i.e.*, plaintiff-appellant before us) associating with him Kashi Nath, assignor, put in an application to be allowed to execute the decree for costs. This application was made under s. 232, Civil Procedure Code, and was refused by the Court, and it would appear that the judgment-debtor, that is, Panna Lal, defendant-respondent before us, objected to the prayer in the application, and the Court referred the decree-holder to a regular suit. The plaintiff-appellant took various proceedings ineffectually. He appealed to the Judge, but his appeal was dismissed, as no appeal could lie under the provisions of the Civil Procedure Code. He applied to the High Court to revise the order of the Court on his application for execution, but without success.

He then brought a suit in the Court of Small Causes to recover the amount of costs ; but it was held that the suit would not lie in that Court. He has now instituted the present suit in the Court of the Munsif of Agra to recover the sum to which he was entitled as costs under the High Court decree assigned to him by Kashi Nath. The Court below has held that he can only recover the amount by

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executing the decree, and not by a separate suit. Ram Bakhsh, plaintiff, has appealed against this decree. I am of opinion that the plaintiff, as the holder of the decree by assignment, can only recover the amount under it by executing the decree, and not by a separate suit; and, so far, I concur with the lower Court; but it appears to me that he is entitled to have a decree declaring that the assignment to him by Kashi Nath of his rights under the decree of this Court is a valid assignment, and gives him a right to execute it; and that the Court's order under s. 232, which disallowed the execution, was an improper one. A suit for this relief is certainly maintainable, for there is no appeal from orders under s. 232, Civil Procedure Code; and there would be no remedy if a suit was not allowed; and looking at the plaint and the issues on which the parties were divided, and the fact that the Court, which refused his application for execution, referred him to the Civil Court, this relief may, I think, be properly given in this suit, and there is no question as to the fact that the assignment was made by Kashi Nath in favour of the plaintiff. The decree of the lower appellate Court will be modified accordingly. The plaintiff will pay Kashi Nath's costs in all Courts. The other parties will pay their own cost.

MAHMOOD, J.—I concur in the order proposed by my learned brother Oldfield, and also in the reasons which he has given. I need only add that the reason why this suit is maintainable is, that the present plaintiff never having been accepted on the record as holder of the decree, the questions which were disposed of by the Court executing the decree, as between the plaintiff and the judgment-debtor, cannot be regarded as questions within s. 244 of the Civil Procedure Code. These observations apply to the connected cases also.

APPELLATE CRIMINAL.

1885
March 6.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* SHEO DAYAL.

Act XLV of 1860 *(Penal Code), ss* 24, 25, 471—*Fraudulently using as genuine a forged document—"Dishonestly"—"Fraudulently."*

In a trial upon a charge, under s. 471 of the Penal Code, of fraudulently or dishonestly using as genuine documents known to be forged, it was found that four forged receipts for the payment of rent, used by the prisoner, had been fabricated in lieu of genuine receipts which had been lost.

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Held that, with reference to the definitions of the terms "dishonestly" and "fraudulently" in ss. 24 and 25 of the Penal Code, the prisoner, upon the facts as found, had not committed the offence punishable under s. 471.

THIS was an appeal from an order of Mr. G. J. Nicholls, Officiating Sessions Judge of Azamgarh, dated the 18th November, 1884, convicting the appellant of the offence of fraudulently using as genuine a forged document.

The appellant was convicted of fraudulently using as genuine four documents purporting to be receipts for the payment of money, knowing such documents to be forged. It appeared that the appellant, claiming to be the occupancy-tenant of certain land, applied in the Revenue Court to recover the occupancy of the land, alleging that two of the proprietors of the estate in which such land was situate, called Faiz Ali and Ramdaur Singh, had wrongfully dispossessed him. In the course of the proceedings he produced four receipts for the payment of rent, which were forged. It was in respect of these documents that the appellant had been convicted of an offence under s. 471 of the Penal Code.

The assessors found as a fact, and the Sessions Judge agreed with them, that the forged receipts had been fabricated in lieu of genuine receipts which had been lost. The assessors were of opinion, on this finding, that the appellant had committed no offence in using them as he did. The Sessions Judge differed with the assessors on this point, observing as follows:—"It amounts to forgery, if the false document be made with intent to support any claim or title. Even if a man has a legal claim or title to property, he will be guilty of forgery if he counterfeits documents in order to support it."

Munshi *Kashi Prasad*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

BRODHURST, J.—The Sessions Judge, differing from the assessors, has convicted Sheo Dayal *alias* Sur Dayal, under s. 471 of the Indian Penal Code, and has sentenced him to two years' rigorous imprisonment. In the appeal it is pointed out that the Judge has in his judgment recorded that the receipts "have been fabricated, it may be granted, in lieu of genuine receipts which have been lost," and that the accused "has to all appearance been cruelly

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injured, and that he has met the violence and perjury of Faiz Ali and Ramdaur Singh by concocting new receipts to supply the want caused by his losing his genuine ones."

The Judge has observed :—"It amounts to forgery if the false document be made with intent to support any claim or title. Even if a man has a legal claim or title to property, he will be guilty of forgery if he counterfeits documents in order to support it." The Judge, apparently, has overlooked s. 464 of the Penal Code, which shows that the "false document" referred to in s. 463 must, to constitute forgery, have been made "dishonestly or fraudulently." "Dishonestly" and "fraudulently" are defined in ss. 24 and 25 of the Penal Code respectively, and, with reference to those definitions, the accused, on the findings of the Judge, as contained in the extracts above given, did not commit the offence of which he has been convicted. The conviction and sentence are therefore annulled, and the prisoner-appellant will be immediately released.

Conviction set aside.

FULL BENCH.

1885
March 7.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* RAMZAN AND OTHERS.

Act XLV of 1860 (*Penal Code*), *ss.* 79, 296—*Disturbing a religious assembly—Muhammadan Law—Hanafia and Shafia Schools—Right to say 'amin' loudly during worship—Act VI of* 1871 (*Bengal Civil Courts Act*). *s.* 24—*Act I of* 1872 (*Evidence Act*), *s.* 57 (1)—*Muhammadan Ecclesiastical Law—Judicial notice.*

A *masjid* was used by the members of a sect of Muhammadans called the Hanifis, according to whose tenets the word "*amen*" should be spoken in a low tone of voice. While the Hanifis were at prayers, *R*, a Muhammadan of another sect, entered the *masjid*, and in the course of the prayers, according to the tenets of his sect, called out "*amen*" in a loud tone of voice. For this act he was convicted of voluntarily disturbing an assembly engaged in religious worship, an offence punishable under s. 296 of the Penal Code.

The Full Bench (MAHMOOD, J., dissenting) ordered the case to be retried, and that, in re-trying it, the Magistrate should have regard to the following questions, namely, (1) Was there an assembly lawfully engaged in the performance of religious worship? (2) Was such assembly, in fact, disturbed by the accused? (3) Was such disturbance caused by acts and conduct on the part of the accused by which he intended to cause such disturbance, or which acts and conduct, at the time of such acts and conduct, he knew or believed to be likely to cause disturbance?

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Held by MAHMOOD, J., that the discussion occasioned by the act of the accused having, presumably, taken place during the interval when the prayers were not going on, the assembly was not at that time "engaged in the performance of religious worship," and was not "disturbed" within the meaning of s. 296 of the Penal Code; that, in reference to the terms of s. 39 of the Code, the accused did not disturb the assembly "voluntarily;" that he was justified by the Muhammadan Ecclesiastical Law in entering the mosque, and joining the congregation in saying the word "*amen*" loudly if he thought fit, and his conduct fell within the purview of s. 79 of the Penal Code, and was therefore not an offence under s. 296. *Beatty* v. *Gillbanks* (1) referred to.

Also *per* MAHMOOD, J., that having regard to the guarantee given by the Legislature in s. 24 of Act VI of 1871 (Bengal Civil Courts Act), that the Muhammadan Law shall be administered in all questions regarding "any religious usage or institution," the Court was bound by s. 57 (1) of Act I of 1872 (Evidence Act) to take judicial notice of the Muhammadan Ecclesiastical Law, and the rules of that law need not be proved by specific evidence.

THIS was an application to the High Court for the exercise of its powers of revision under s. 439 of the Criminal Procedure Code. It appeared that the applicants, Ramzan, Muhammad Husain, and Abdul Rahman, were convicted by the Cantonment Magistrate of Benares, Major R. Annesley, by an order dated the 25th September, 1884, of an offence under s. 296, Indian Penal Code. The judgment of the Cantonment Magistrate was as follows:—

"The particulars of this case are as follow:—In muhalla Maddanpura, City Benares, a large *masjid* exists, generally called Allu's *masjid*, after the builder. Abdulla, the complainant, was left in charge of this *masjid* after Allu's death, some years ago, and Ramzan, accused, is a grand-nephew of Allu's, and also his son-in-law. During the month of August, 1884, Ramzan, who it seems had not frequented this *masjid* for many years, suddenly returned to it. He was accompanied by Muhammad Husain, accused, and Abdul Rahman, accused, and these three men at once began a series of annoyances to the assembly engaged in prayer in the *masjid*. The men who use the *masjid* nearly all belong to a sect called Hanifis, and Ramzan also formerly belonged to it, but has lately become a Wahabi. It appears the Hanifis use the word '*amen*' in their prayers, but say it so low that only a person standing very close can hear it. The Wahabis, on the contrary, call out '*amen*' at the top of their voices, and by doing so in the Allu *masjid* the three accused naturally disturbed the Hanifis

(1) L. R., 9 Q. B. D. 308.

engaged in prayer. The evidence for the prosecution is perfectly clear; first, as to the fact of the three accused having entered the *masjid* on four successive Fridays during August and September, 1884; secondly, as to having by their behaviour disturbed the assembly at prayers; and thirdly, as to police intervention being necessary, on the 22nd August, 1884, to quell a disturbance occasioned by the accused, and which threatened to become serious. The witnesses are respectable persons, and most moderate in the views they express when giving evidence. They consider the presence of Ramzan and his companions not desirable in the *masjid*, but raise no objection to their joining the worshippers as long as they cause no disturbance. Ramzan states that there is enmity between him and Abdulla on account of the *masjid* accounts, and that therefore he was turned out of it on pretence of his saying '*amen*' loudly, which is not objectionable to the Hanifis, the real reason being that Abdulla will not give him a statement of the *masjid's* income, also that he has always prayed at that *masjid*. The other two accused say, that on 22nd August, 1884, they saw Ramzan being beaten and interfered with; on which Abdulla and his party have included them in the charge brought against Ramzan. The witnesses for the defence merely state that they consider that calling out "*amen*" loudly does not disturb an assembly at prayers, and yet they all state they only speak the word very low themselves. They also speak to the quarrel having originated in money matters about repairs to the *masjid*, and further, that the three accused have frequented this *masjid* for years. I note, however, that the only independent witness, a Hindu named Harpal, who keeps a shop under the *masjid*, states that he has been there for five years, and that only within the last month has Ramzan come to the *masjid*,—never before. Be that as it may, Ramzan and his companions, the two other accused, had not a shadow of an excuse for disturbing the people in the *masjid*. It is useless to inquire whether it is lawful or not to use the word '*amen*.' As long as by doing so the accused disturbed the assembly, they rendered themselves liable to punishment under s. 296, Indian Penal Code. If it be true that the enmity between Ramzan and Abdulla originated in a quarrel about the income of the *masjid*, his conduct is all the more reprehensible, for he has disturbed a large number

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of persons engaged in prayer, merely to gratify his spite against an individual. The Courts of law are the proper places to settle money quarrels in, and not places of religious worship, and it is intolerable that men like the accused should be allowed to cause annoyance to a whole community.

"The Court is of opinion that Ramzan, son of Maddar, Muhammad Husain, son of Allahdin, and Abdul Rahman, son of Abdul Karim, are guilty of the charge preferred against them, *viz.*, that they voluntarily disturbed an assembly engaged in religious worship, thereby committing an offence punishable under s. 296, Indian Penal Code; and the Court directs that the said Ramzan, Muhammad Husain, and Abdul Rahman, pay a fine of twenty-five rupees each, or, in default, be rigorously imprisoned for one month."

The ground of this application for revision was that "to pronounce the word '*amin*' (amen) in a loud tone during the prayers is not an offence punishable under s. 296 of the Indian Penal Code."

The application came for hearing before Brodhurst, J., by whom it was referred to a Divisional Bench. On the application coming before Oldfield and Mahmood, JJ., those learned Judges referred to the Full Bench the question "whether the facts proved in this case amount to an offence under s. 296 of the Indian Penal Code."

Mr. *Amir-ud-din*, for the applicants.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

On the 21st February, 1885, the following opinions were delivered:—

PETHERAM, C. J.—Speaking for myself only, the order which I propose to pass in this case is, that the case be re-tried by the Magistrate, and that in re-trying it he should have regard to the following questions:—

1. Was there an assembly lawfully engaged in the performance of religious worship?

2. Was such assembly in fact disturbed by Ramzan?

3. Was such disturbance caused by acts and conduct on the part of Ramzan by which he intended to cause such disturbance, or which acts and conduct, at the time of such acts and conduct, he knew or believed to be likely to cause such disturbance?

STRAIGHT, J.—I consent to the proposed order, though, speaking for myself alone, I am not prepared to say that there is not upon the record sufficient evidence to justify a conviction.

OLDFIELD, J.—I am of the same opinion.

BRODHURST, J.—I am of the same opinion.

MAHMOOD, J.—In this case I regret I am not able to concur in, or dissent from, the proposed order, because I have not yet been able to form any definite opinion. Under such circumstances, and considering that I am one of the Judges constituting this Bench, I should have thought that the judgment or order of the Court would, according to the ordinary judicial usage and practice, be reserved till I had an opportunity of forming an opinion in the case, and of placing my views before my honourable colleagues. But upon this point I have been overruled by the learned Chief Justice and my learned brethren, and I must therefore defer to their view, though I confess—and I say this with profound respect—that the order of the majority of the Court seems to me to be, under the circumstances, one of doubtful legality. In a recent case—*The Rohilkhand and Kumaun Bank* v. *Row* (1)—I had the opportunity of expressing my views, in which the rest of the Bench concurred, to the effect that it is an essential principle of judicial acts, that when a Court, consisting of several Judges, hears a case, no judgment or order can be legally passed until all those Judges have conferred with each other and made up their minds together. Upon this occasion, however, I must submit to the view of the majority of the Bench; but I regret, as I said before, that I am not in a position to make any order in this case, and must, *ex necessitate*, reserve my judgment or order, till the exigencies of the business of the Court leave me time to form a definite opinion on this case, which, considering that none of the accused is undergoing the sentence of imprisonment, does not seem to me to be one of any especially emergent urgency.

On the 14th March the following opinion was delivered by Mahmood, J., on the question referred to the Full Bench :—

(1) I. L. R., 6 All. 468.

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MAHMOOD, J.—This case originally came on for hearing in the Single Bench before my brother Brodhurst, and, in view of the peculiarities of the question with regard to the right of worshipping in mosques possessed by Muhammadans, my learned brother referred the case to a Division Bench, of which, at his suggestion, and with the approval of the learned Chief Justice, I was to be a member. The case was accordingly heard by a Bench consisting of my brother Oldfield and myself; and, in consideration of the fact that the main object of the application for revision obviously was to obtain an autho.itative ruling upon the question, and also because the applicant's counsel informed us that the applicants, having paid the fines inflicted upon them, were not undergoing the alternative sentence of imprisonment, we referred the case to the Full Bench, before which the case was re-argued by Mr. Amir-ud-din on behalf of the applicants, and the learned Public Prosecutor on behalf of the Crown. Upon that occasion, after having fully heard the arguments on either side, I was unable to form any opinion such as could be made the basis of any order in the case, and being desirous of consulting the original authorities of Muhammadan Law, I wished to reserve my order to enable me to prepare a judgment in writing, as the question raised by the reference seemed to be far from simple, specially as, in my opinion, it turned upon a very minute point of the Muhammadan Ecclesiastical Law. The learned Chief Justice and my learned brethren, however, were able on that occasion to form an opinion in the case, and made an order remanding the case for re-trial on certain issues. My brother Straight, whilst consenting to the order of re-trial, was inclined to the opinion that the evidence on the record was sufficient to justify the conviction I was, however, unfortunately not able to concur in, or dissent from, the order for the simple reason that I had formed no definite opinion in the absence of the authorities of Muhammadan Law, which had not been cited on either side.

Under these circumstances, it has devolved upon me now to deliver my judgment in the case, and I regret that the conclusion at which I have arrived is different from that at which the learned Chief Justice and the rest of the Court have done. In view of this circumstance, and also because facts similar to those that

exist in this case have before now been made the subject of criminal prosecutions in cases which have ultimately come up to this Court in revision, I wish to explain my reasons fully.

The facts of the case itself are very simple. The mosque in question in this case is situate in muhalla Maddanpura, in the city of Benares, and it was built by one Ali Muhammad *alias* Allu, who is stated by the prosecution to have followed the doctrines of Imam Abu Hanifa, and was therefore a Hanifi. The prosecutor, Abdulla, is a brother-in-law of the founder of the mosque, his sister having been married to Allu, and the principal accused, Ramzan, is the son-in-law of Allu, and also otherwise related to him. The other two accused, Muhammad Husain and Abdul Rahman, are persons holding religious views similar to those held by Ramzan.

It appears that on the 22nd of August, 1884, the three accused joined the congregation in the mosque, and during the prayer said the word "*ámín*" aloud. This appears to have led to a discussion as to whether it was right to say the word aloud in prayers, and a heated argument took place, resulting in the accused being turned out of the mosque with the help of the police, and the prosecutor prohibiting them from coming to the mosque again unless they renounced the rite of saying "*ámín*" aloud in prayers.

On the 1st of September, 1884, Abdulla and some other persons presented an application to the Magistrate, describing the occurrence of the 22nd August, and asking for the interference of the Magisterial authorities, on the ground that breach of the peace was likely to take place by reason of the accused insisting upon saying the word "*ámín*" aloud in prayers. No definite action appears to have been taken by the Magisterial authorities on that application beyond sending it for inquiry to the City Inspector of Police, and matters seemed to have stood thus, when, on the 20th of September, 1884, Abdulla by himself filed another petition, complaining of the accused, and charging them with "the offence of insulting the religion of the Hanafia Musalmans" under ss. 297, 298, and 352 of the Indian Penal Code. The Magistrate, after having examined the prosecutor and the witnesses for the prosecution, framed charges against the accused under s. 296 of the

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Indian Penal Code, and after having taken the evidence on behalf of the defence, convicted them under that section, and sentenced them to pay a fine of Rs. 25 each, and in default to undergo rigorous imprisonment for one month.

The accused have applied for revision to this Court under s 439 of the Criminal Procedure Code, on the ground that "to pronounce the word '*ámín*' in a loud tone during the prayers is not an offence punishable under s. 296 of the Indian Penal Code."

The question so raised seems to me to involve mixed considerations of the meaning of the Indian Penal Code and the Muhammadan Ecclesiastical Law; for, according to my view, the application of the former depends upon the interpretation of the latter in connection with this case. But before discussing this question, I wish to express my views with reference to the observation which was made in the course of the argument, that this Court is not bound to consider the Muhammadan Ecclesiastical Law in such cases without having the rules of that law proved by specific evidence like any other fact in a litigation. I am unable to accept this view, because, if it is conceded that the decision of this case depends (as I shall presently endeavour to show it does depend) upon the interpretation of the Muhammadan Ecclesiastical Law, it is to my mind the duty of this Court, and of all Courts subordinate to it, to take judicial notice of such law. I hold that cl. (1) of s. 57 of the Evidence Act (I of 1872) fully covers the Muhammadan Ecclesiastical Law in such cases, because, whenever a question of civil right or the lawfulness of an act arises in a judicial proceeding, even a Criminal Court is bound, *ex necessitate*, to resort to the civil branch of the law; and, in a case like the present, the question being the right of a Muhammadan to pray in a mosque according to his tenets, the question of legality or illegality would fall under the purview of the express guarantee given by the Legislature in s. 24 of the Bengal Civil Courts Act (VI of 1871), that the Muhammadan Law shall be administered with reference to all questions regarding "any religious usage or institution." That the application of some of the sections of the Indian Penal Code depends almost entirely upon the correct interpretation of the rules of civil law, cannot, in my opinion, be doubted; and if it is so, the present case is only another illustration of this

principle. Indeed, I am prepared to go the length of saying that, but for this principle, the rules of the Penal Code would in many cases operate as a great injustice, and acts fully justified by the civil law would constitute offences under that Code. I hold therefore that in a case like the present, the provisions of s. 56 of the Evidence Act fully relieve the parties from the necessity of proving the Muhammadan Ecclesiastical Law upon the subject, that that law is not to be placed upon the same footing with reference to this matter as any foreign law of which judicial notice cannot be taken by the Courts in British India ; and it follows that I can refer to the Muhammadan Ecclesiastical Law for the purposes of this case, notwithstanding the absence of any specific evidence on the record regarding its rules.

Now, before going further, I wish to observe that the main allegations on behalf of the prosecution, contained in the petition of the 1st September, 1884, and in that of the 20th September, 1884, relate to the conduct of the accused in saying the word "*ámín*" aloud during prayers in the mosque; that in the evidence for the prosecution itself the loud utterance of that word is the *gravamen* of the accusation ; that the Magistrate framed charges under s. 296, Indian Penal Code, with reference to that matter alone, disregarding the other sections of the Indian Penal Code cited on behalf of the prosecution ; and that his judgment entirely proceeds upon the view that the loud utterance of the word "*ámín*" during prayers constitutes a criminal offence under the circumstances of this case. It is true that in the evidence for the prosecution there were vague allegations as to other facts which might possibly have furnished basis for charging the accused under some other sections of the Indian Penal Code; but, as a matter of fact, the Magistrate did not charge or try the accused under any other section, and at all events we in the Full Bench are not concerned with the whole case.

Holding these views, I feel myself called upon, sitting as a Judge in the Full Bench to which the reference has been made solely as to s. 296 of the Indian Penal Code, to consider the case for the purpose of answering the reference only in that aspect, leaving it to the referring Bench to decide questions which may possibly arise in the case beyond the scope of the question referred.

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But before discussing the various elements of the offence described in the section, I think it necessary to consider whether the saying of *ámin* aloud in prayers is not an act which falls within the purview of s. 79 of the Indian Penal Code, which lays down the elementary proposition of the criminal law that "nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it."

The word *ámin* is of Semitic origin, being used both in Arabic and Hebrew, and has been adopted in prayers by Muhammadans as much as by Christians. The word does not occur in the Kuran, but in conformity with the "*Sunna*," or the practice of the Prophet, it is regarded by Muhammadans as an essential part of the prayers, as a word representing earnestness in devotion. The word is pronounced at the end of the first chapter of the Kuran, which consists of the following prayers:—"Praise be to God, the Lord of all creatures; the most merciful, the King of the day of judgment. Thee do we worship, and of Thee do we beg assistance. Direct us in the right way, in the way of those to whom Thou hast been gracious; not of those against whom Thou art incensed, nor of those who go astray."

In order to understand the exact difficulty which has arisen in this case with reference to the word *ámin*, it is necessary to bear in mind that Muhammadanism, like other religions, is divided into various sects or schools of doctrine, differing from each other either in matters of principle or in matters of detail as to the minor points of ritual. "The Musalmans who assume to themselves the distinction of orthodox, are such as maintain the most obvious interpretation of the Kuran and the obligatory force of the traditions in opposition to the innovations of the sectaries, whence they are termed *Sunnis* or traditionists..... and it is their opinion alone which is admitted to have any weight in the determinations of jurisprudence." These four schools or sects, of which this concise account has been given by Mr. Hamilton in the Preliminary Discourse of his translation of the Hedaya, were founded by the four *orthodox* Imams, namely, Abu

Hanifa, Malik, Shafai, and Hanbal, all of whom flourished within the first two centuries of the Muhammadan era, or the eighth century of the Christian era. To use the language of Mr. Hamilton again :—"The word *orthodox* as here used is confined purely to a justness of thinking in spiritual matters, concerning which the opinions of those four sects perfectly coincide, the differences among them relating solely to their expositions of the temporal law."

I have mentioned all this in order to render intelligible what I am going to say presently regarding the Muhammadan Ecclesiastical Law with reference to pronouncing the word *ámín* in prayers. All parties concerned in this case admittedly belong to the *Sunni* persuasion, and the mosque in question belongs also to the *Sunni* section of the Muhammadan population. It is an indisputable matter of the Muhammadan Ecclesiastical Law that the word *ámín* should be pronounced in prayers after the *Sura-i-Fateha* or the first chapter of the Kuran, and that the only difference of opinion among the four Imams is, whether it should be pronounced aloud or in a low voice. The Hedaya, which is the most celebrated text-book of the Hanafi school of law, lays down the rule in the following terms :—"When the Imam (leader in prayers) has said 'nor of those who go astray,' he should say *ámín*, and so should those who are following him in the prayers; because the Prophet has said that 'when the Imam says *âmín*, you must say *ámín* too, ... and it must be said in a low voice, because such is the tradition stated by Ibu-i-Masud, and also because the word is the prayer, and should therefore be pronounced in a low voice." That this doctrine is the result of weighing the authority of conflicting traditions is apparent from the commentary on the above passage of the Hedaya by Ibu-i-Humam, a celebrated author of the Hanafi school. These traditions are collected in the celebrated collections of traditions (*Siha*) of Bukhari and Muslim, both equally acknowledged as accurate traditionists by all the schools of the Sunni Muhammadans. From the same traditions the followers of Imam Shafai have evolved the doctrine that *ámín* should be pronounced aloud, and the views of that school are best stated by Nawawi, a commentator on *Sahi Muslim*. The followers of the other two Imams, namely, Malik and Hanbal, also main-

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tain that the word *ámín* should be pronounced aloud. But it is not necessary to cite authorities for this proposition, because their followers do not exist in British India. From what I have already said, it is clear that the doctrines of all the four Imams are regarded by Sunni Muhammadans as orthodox, and that the differences of opinion which exist between them are pure matters of detail. Indeed, in the greatest mosque in the world, namely, the *Kaaba* itself, the followers of all the four Imams are at full liberty to pray according to their own tenets. The Shafais, as is apparent from the texts which I have already quoted, pronounce the word *ámín* aloud in prayers, and to this no objection is or can be made on the ground that the practice is heterodox from a Sunni point of view. Indeed, the prosecutor in this very case, in his petition of the 20th September, 1884, after stating that the orthodox Muhammadans are the followers of the four Imams, goes on to say that "if the defendants had been the followers of any one of the four Imams, the complainant, who is a Hanafi, and other Muhammadans, would not have shrunk from associating with them," and the ground of the complaint is stated in the petition to be that the defendants "are not the followers of any of the four Imams," that "they intend to set up a new form of worship for themselves;" that "they are therefore no longer Muhammadans;" and by saying the word *ámín* aloud they "have been guilty of the offence of insulting the religion of the Hanafia Musalmans." Now. unless these allegations are substantiated, I am of opinion that there can be no case against the accused under s. 296 of the Indian Penal Code. The prosecutor states himself and the founder of the mosque to be a Hanafi, that is, the follower of Imam Abu Hanifa's doctrines. One of the highest authorities of that school is the *Dwur-i-Mukhtar*, in which the strongest text is to be found against saying *ámín* aloud; but the text itself falls far short of substantiating the rule of Ecclesiastical Law, upon establishing which the case for the prosecution in my opinion depends. The text is as follows:—"It is in accord with the practice of the Prophet to say *ámín* in a low voice, but the departure from such practice does not necessitate invalidity (of the prayer), nor a mistake, but it is only a detriment." Even this passage only relates to the efficacy or validity of the prayer of the person who says *ámín* aloud or in

a low tone. There is absolutely no authority in the Hanafia or any other of the three orthodox schools of Muhammadan Ecclesiastical Law which goes to maintain the proposition that if any person in the congregation says the word *ámín* aloud at the end of the "*Sura-i-Fateha*," the utterance of the word causes the smallest injury, in the religious sense, to the prayers of any other person in the congregation, who, according to his tenets, does not say that word aloud. It is a matter of notoriety that in all the Muhammadan countries like Turkey, Egypt, and Arabia itself, Hanafis and Shafais go to the same mosque, and form members of the same congregation, and, whilst the Hanafis say the word *ámín* in a low voice, the Shafias pronounce it aloud. To say that the utterance of the word *ámín* aloud, after the Imam has recited the "*Sura-i-Fateha*" causes a disturbance in the prayers of a congregation, some or many of whom say the word in a low tone, is to contradict the express provisions of the Muhammadan Ecclesiastical Law as explained by all the four orthodox Imams. I now pass to the next step in the case, namely, whether the accused in this case had the legal right to enter into and worship in the mosque with the congregation according to their own tenets. There is absolutely no evidence in the case to substantiate the accusation brought by the prosecutor against them that they are "no longer Muhammadans." They call themselves "Muhammadi," which is the Arabic for "Muhammadan," and although the prosecutor brands them as Wahabis, there is nothing to prove that they belong to any hetorodox sect. Indeed, the only tangible ground upon which the prosecutor objects to their worshipping in the mosque and calls them Wahabis is their saying the *ámín* aloud—a practice which, as I said before, is commended by three out of the four orthodox Imams of the Sunni persuasion, and which, according to the doctrine of Imam Abu Hanifa himself, does not vitiate the prayers. Now, it is a fundamental principle of the Muhammadan Law of *wakf*, too well known to require the citation of authorities, that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God (to use the language of the Hedaya) "in such a manner as subjects it to the rules of Divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advan-

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tage of it resulting to his creatures." A mosque once so consecrated cannot in any case revert to the founder, and every Muhammadan has the legal right to enter it, and perform devotions according to his own tenets so long as the form of worship is in accord with the recognized rules of Muhammadan Ecclesiastical Law. The defendants therefore were fully justified by law in entering the mosque in question and in joining the congregation, and they were strictly within their legal rights, according to the orthodox rule of the Muhammadan Ecclesiastical Law, in saying the word *ámín* aloud.

I now proceed to consider whether, under the circumstances of this case, the prosecution have succeeded in substantiating an offence under s. 296 of the Indian Penal Code.

The following seem to me to be the constituents of the *corpus delicti* :—

(1) That the assembly was lawfully "engaged in the performance of religious worship."

(2) That the accused caused a "disturbance" to such assembly.

(3) That they caused such disturbance "voluntarily."

In regard to the first point, there can be no doubt, and indeed there is no question, that the mosque being public, the congregation was lawfully assembled there for the purposes of religious worship.

The second question is not so simple, because the word "*disturbance*" is not defined in the Indian Penal Code. But I think I may adopt the language of Shaw, C.J., in an American case cited by Mr. Bishop in his treatise on *Criminal Law* :—"What shall constitute an interruption and disturbance of a public meeting or assembly cannot easily be brought within a definition applicable to all cases ; it must depend somewhat on the nature and character of each particular kind of meeting, and the purposes for which it is held, and much also on the usage and practice governing such meetings. As the law has not defined what shall be deemed an interruption and disturbance, it must be decided as a question of

fact in each particular case; and, although it may not be easy to define it before hand, there is commonly no great difficulty in ascertaining what is a wilful disturbance in a given case."—(Bishop on *Criminal Law*, 6th ed., vol. 2, p. 308). In illustrating this, the learned author, after giving some examples of what would cause a disturbance, goes on to say:—"Again, among one class of religionists a solemn *amen* would be permissible, where among another class it would not be" (p. 310). In the present case I have already said enough to show that whilst the Hanafis, who evidently form the majority of the congregation of this mosque, prefer to say *ámín* in a low voice, there is nothing in their tenets which would vitiate their prayers if any person among the congregation prefers the other equally orthodox tenet of pronouncing the word aloud. There is no allegation on behalf of the prosecution that the accused either uttered the word irreverently or at an improper juncture of the prayers, or otherwise than in the conscientious performance of their devotions. Nor is there any allegation to the effect that the accused pronounced the word *ámín* in a loud tone with any intention of disturbing the assembly. The rest of the evidence for the prosecution only goes to show that the accused, being earnest believers in the doctrine of saying *ámín* aloud, entered into a somewhat heated discussion with the other worshippers and employed the word *kafir* (unbeliever) to those who did not accept their doctrine upon the point. Purely as a question of the weight of evidence, I hold that such a discussion could not have taken place during the prayers, because the Muhammadan ritual absolutely prohibits the utterance of any words other than those of the prayers during the *namaz* or divine service. The prosecution itself makes no such allegation, and if the discussion took place before or after the service, though in the mosque itself, I hold that even if the discussion be regarded as a disturbance, it would not fall under the purview of s. 296, Indian Penal Code. This view of the law is in accord with that adopted by Abbott, C.J., in *Williams* v. *Glenister*, cited in *Russell on Crimes*, vol. I, p. 417. In that case the person accused of having molested a religious assembly in a church had, notwithstanding the prohibition of the minister, stood up in his pew and read a notice "after the Nicene Creed had been read, and whilst the minister was walking from

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the communion table to the vestry room, and whilst no part of the service was *actually* going on." It was held that such act, having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give the notice, he was not criminally liable. The case, however, being based upon a statute is only analogically applicable to the present case, and I cite it simply to put my interpretation upon the phrase "engaged in the performance of religious worship" as used in s. 296 of the Indian Penal Code. As to the merits of the present case itself upon this particular point, I have to observe that a Muhammadan mosque is in many respects different, so far as I know, from an ordinary Christian church; because it is not only a place for divine worship, but also intended for religious and moral teaching and discussion, and it is not unusual that in places where the Muhammadan community is still flourishing, a library and a school form part of the mosque. I cannot therefore hold that to carry on religious discussion in a mosque, even though the majority of the people present at the time do not approve of such discussion, constitutes a criminal offence. There may indeed be circumstances which may render such discussion liable to cause breach of the peace; but in that case the law has provided other remedies, and, concerned as I am in the Full Bench only with s. 296 of the Indian Penal Code, I will simply say that the remedy does not fall under that section. The third point relates to the meaning of the word "voluntarily" as used in s. 296 of the Indian Penal Code, and upon this point s. 39 of the Code provides an explanation in express language. I am of opinion that the evidence in this case does not prove that the accused uttered the word *ámín* aloud with the intention of disturbing the rest of the congregation, though after the occurrence of the 22nd August, 1884, they might have known that the prosecutor and his friends would object to their saying the word aloud. But the question is not of any great consequence under my view of the case; because the accused being fully entitled by law to enter the mosque, to join the congregation, and to say the word *ámín* aloud, they were justified by law to exercise their right of worship within the meaning of s. 79 of the Indian Penal Code.

At the hearing of the case before the Full Bench, the learned Public Prosecutor laid considerable stress upon the argument that to justify a conviction under s. 296, Indian Penal Code, it is of no consequence whether the act which causes the disturbance is in itself lawful or unlawful, that the mere fact of the disturbance being caused to the religious assembly is sufficient to constitute the offence, specially as the accused in this case had reason to believe that saying the word *ámín* might be objectionable to the prosecutor and his party, and might cause breach of the peace. I am unable to accept this view of the law, for to use the words of Field, J., in *Beatty* v. *Gillbanks* (1), "it amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." Not only do I hold that s. 79 of the Code furnishes a full answer to the argument; but that such a principle would place the minority at the mercy of the majority, and would, in a case like this, deprive them of the right of worship which the law distinctly confers upon them. Indeed if such a view were adopted, it would open the door for wrongful prosecution of innocent persons, who in the exercise of their lawful rights of worship resort to mosques for devotion. Such indeed may be the case here, because there is enough in the evidence for the defence to raise a suspicion that the saying of *ámín* aloud has been made a pretext for the prosecution with the object of preventing the accused from resorting to the mosque for worship, and thus to debar them from asking the prosecutor to render accounts of the disbursement of the income of the property belonging to the mosque, of which he states himself to be the *mutawalli* or superintendent. The witnesses for the defence, who are themselves Hanafis, have solemnly deposed that they do not object to *ámín* being pronounced aloud in prayers, and their statements deserve weight, being in perfect accord with the doctrines of Imam Abu Hanifa himself.

Having taken this view of the case, I regret I am unable to concur in the order of re-trial passed by the learned Chief Justice and my learned brethren, and I would return the case to the referring Bench with a negative answer to the question referred.

(1) L. R. 9 Q. B. D. 308.

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March 9.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

RUP NARAIN (PLAINTIFF) *v.* AWADH PRASAD (DEFENDANT.)*

Pre emption—Mortgage by conditional sale—Limitation—Acquiescence—Equitable estoppel—Wajib-ul-arz—"Nearer co-sharer."

The two joint owners of a two annas eight pies share in a village jointly executed two deeds of mortgage by conditional sale, each for a share of one anna four pies, in favour respectively of *R* and *A*, co-sharers in the village, and related to the vendors. In 1875, the conditional sale in favour of *R* became absolute, and he was recorded as proprietor of half the share of the vendors, and obtained possession thereof. In 1882, *A* foreclosed his mortgage, and obtained possession of the other half share. *R* thereupon claimed the right to purchase the half share so acquired by *A*, on the allegation that he had a right of pre-emption in respect thereof, having become the vendee in 1875 of the other half share, and therefore being the "nearer co-sharer" of the vendors within the meaning of the *wajib-ul-arz*, and also being nearer in relationship to the vendors than *A*. The *wajib-ul-arz* provided that each co-sharer was competent to transfer his own share, but that, when making a transfer, it was incumbent on him to notify the same to his near co-sharer, and on his refusal, to other sharers in the village. The lower appellate Court held that the plaintiff was estopped from preferring a claim to pre-emption, on the ground that he had acquiesced in the conditional sale in favour of the defendant, and also that he had no right to pre-emption under the *wajib-ul-arz*.

Held that inasmuch as from 1875 to 1882 the only owners of the two annas eight pies share were the plaintiff and the mortgagors, they were the only co-sharers in respect of this particular share, although there were other co-sharers in the village; that the plaintiff must therefore be regarded as a "nearer co-sharer" of the vendors than the defendant within the meaning of the *wajib-ul-arz*, and that, as such, he was entitled to claim pre-emption.

Held also that the right of pre-emption which arose upon the sale was a new right, and not the same as that which arose at the time of the mortgage, inasmuch as the *wajib-ul-arz* distinctly contemplated the right of pre-emption as arising upon the two different events of mortgage and sale; that the alleged acquiescence of the plaintiff pre-emptor therefore occurred at a time when the right claimed by him was not yet in existence; and that consequently the claim was not barred.

THE plaintiff in this suit claimed to enforce a right of pre-emption. It appeared that on the 22nd July, 1873, at the same time and place, Dhanbasi and Udit Narain, who were recorded proprietors of a two annas eight pies share in a certain village, in

* Second Appeal No. 567 of 1884, from a decree of R. J Leeds, Esq, District Judge of Gorakhpur, dated the 21st February, 1884, reversing a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 28th June, 1883.

equal shares of one anna four pies each, jointly executed two deeds of mortgage by conditional sale, each for a share of one anna four pies, in favour respectively of the plaintiff in this suit, Rup Narain, and of the defendant in this suit, Awadh Prasad, co-sharers in the village, and related to the vendors, the former in the twelfth degree and the latter in the eleventh. The moneys advanced not being repaid within the stipulated period, both mortgagees, in 1874, instituted proceedings for foreclosure. The conditional sale in favour of Rup Narain became absolute towards the end of 1875, whilst that in favour of Awadh Prasad, owing to an irregularity in the proceedings, did not become so till nearly two years later in 1877. On the conditional sale in favour of Rup Narain becoming absolute, he was recorded as proprietor in respect of half the share of the vendors. In March, 1883, Rup Narain instituted the present suit against Awadh Prasad, in which he claimed the right to purchase the half share of the vendors which the latter had acquired by foreclosure of the conditional sale in his favour, on the allegation that he had the right of pre-emption in respect of such half, having become the vendee, in 1875, of the other half, and being therefore the "nearer co-sharer" (*hissadar karibi*) of the vendors, within the meaning of the *wajib-ul-arz*, and also being nearer in relationship to the vendors than the defendant. That document provided that each co-sharer was competent to transfer his own share, but that, when making a transfer, it was incumbent on him to notify the same to his near co-sharer, and on his refusal, to other sharers in the village, and to sell or mortgage for a reasonable sum.

The Court of first instance gave the plaintiff a decree enforcing the right of pre-emption claimed. On appeal the lower appellate Court reversed this decree, holding that under the circumstances of the case the plaintiff was equitably estopped from preferring a claim to pre-emption, and that he had no right of pre-emption under the *wajib-ul-arz*. Upon these points the Court observed as follows:—"In the first place, it being freely admitted that the plaintiff consented to the conditional sale in favour of the defendant, it may, I think, be fairly presumed that he acquiesced by anticipation in the possibility of such sale becoming absolute: and secondly, his conduct after the sale had been completed raises a

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still stronger presumption of acquiescence, for he made no attempt to question the transfer within the period of limitation which, prior to the decision of the 17th January, 1882 (I. L. R., 4 All. 218), had always been recognized as that governing suits for pre-emption, and but for the view taken by the High Court it is obvious that his claim would never have been heard of.

"Apart from these consider ons, which, in my opinion, are sufficient to justify me in dismissing the plaintiff's suit, I would point out that his pre-emptive right is at best of a very doubtful character. Blood relationship has no doubt been recognized as one of the constituent elements of the '*karibi hissadar*', but I know of no case where such remote affinity as that which exists in the present instance has been taken into account, and I do not believe it was ever intended that as between two co-sharers the one related to the vendor in the eleventh degree should have any preference over the other related in the twelfth degree. The only remaining foundation for the plaintiff's claim is, therefore, that which alone the lower Court has noticed, and on which he himself mainly relies, *viz.*, his association with the vendors by virtue of his prior purchase. But a glance at the village-papers will show that such association is purely a paper one, there being no thokes or pattis, and the whole area of the mahal being held jointly in anna-pie shares. It may well be questioned then whether the mere substitution in the record of *b's* name for half of *A's* share gives *B* a preferential right to buy the remainder, and in this connection it should be remembered that the substitution of *B* rather than *C* was due to an error in procedure for which *C* was no wise responsible."

The plaintiff appealed to the High Court contending, in his grounds of appeal, *inter alia*, that as the share of the vendors, with the revenue assessed thereon, and the income and profits thereof, was separately recorded, and he had associated with the vendors in such share, and was also a nearer relation of the vendors than the defendant, he had a right of pre-emption; and that "his case being that after he had associated with the vendors in the share standing in their names, the rights and interests of the latter in the said share were transferred to the defendant, the vendors not having before such transfer requested the plaintiff to purchase the same, as the contract of the *wajib-ul-arz* required, it was useless to look to any

acquiescence on the plaintiff's part of a date prior to the said association of his with the vendors and also prior to the transfer of the vendors' share."

Mr. *C. H. Hill*, for the appellant.

Pandit *Ajudhia Nath*, Pandit *Bishambar Nath*, and Babu *Jogindro Nath Chaudhri*, for the respondent.

PETHERAM, C. J.—I have arrived at the conclusion that this appeal must be allowed, and I have done so with some difficulty. The facts, as I understand them, are as follows:—Some years ago a village was divided into shares, which were held by joint owners, and the original shares were two annas eight pies each. One of the shares belonged to two men jointly, and they, requiring money, mortgaged one-half of the share to the plaintiff in the present suit, and the other half to the defendant. The mortgagors continued in possession of the whole share, and accounted for interest to both mortgagees. This state of things continued till 1875, and in that year the plaintiff foreclosed his mortgage, and bought his half share, and obtained physical possession of it, remaining in physical possession as owner from that time. The other mortgagee remained out of possession until 1882, so that from 1875 to 1882 the possession was that of the plaintiff as owner of one-half of the share, and of the mortgagors of the other half, they being joint owners of that share. In 1882 the defendant foreclosed his mortgage, and obtained possession of the other half share. Upon this state of things the plaintiff says:—"I want to buy this share because I am a nearer co-sharer than you are in respect of it, and I am therefore entitled to claim pre-emption." Now, prior to the second foreclosure, the present defendant was not owner of the share; the ownership was in the mortgagors; and therefore, in regard to that share, the owners from 1875 to 1882 were the plaintiff and the mortgagors. During that time therefore they were the only co-sharers, and it follows that the plaintiff must be regarded as a nearer co-sharer than the defendant. This seems to me to be the only reasonable sense which we can attach to the term co-sharer, for although there were other co-sharers in the village, these two alone were interested in this particular share. I think, therefore that we must hold that the plaintiff, as

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the nearest co-sharer, is entitled to claim pre-emption; unless, indeed, it can be shown that his claim is too late.

Now, if the right of pre-emption which arose upon the sale was a new one, the claim will not be barred; but it will be, if the right which then existed was the same as that which arose at the time of the mortgage. It appears to me that it was a new right, because the *wajib-ul-arz* distinctly contemplates the right of pre-emption arising upon the different events, namely, upon the mortgage and sale. The point as to "standing by" depends on the same question. If the mortgage and the sale gave rise to distinct rights of pre-emption, the alleged standing by occurred when the right was not in existence. I am therefore of opinion that the claim is not barred. The appeal must be allowed with costs, and the judgment of the first Court restored, with this exception, that the money declared by the decree of that Court to be payable by the pre-emptor must be directed to be paid within six weeks from the date of the receipt of our decree by the lower Court.

STRAIGHT, J.—I am of the same opinion.

Appeal allowed.

FULL BENCH.

1885 *March* 14.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr Justice Mahmood.

JANKI (DEFENDANT) *v.* GIRJADAT AND ANOTHER (PLAINTIFFS).*

Pre emption—"Sale"—Wajib-ul-arz—Act IV of 1882 *(Transfer of Property Act), s.* 54*—Fraudulent omission to transfer by registered instrument.*

The *wajib-ul-arz* of a village gave the co-sharers a right of pre-emption in cases where any one of them should wish to "transfer his share wholly or partly by sale or mortgage" One of the co-sharers entered into a transaction by which he transferred the possession of his share to a stranger for Rs 300, and had mutation of names effected in the Revenue Department, but, in order to avoid the right of pre-emption, the parties omitted to execute or register a deed of sale in respect of the transfer.

Held by the Full Bench (MAHMOOD, J., dissenting) that the transaction gave rise to the right of pre-emption within the meaning of the *wajib-ul-arz.*

Second Appeal No 200 of 1884 from a decree of Babu Mruttonjoy Mukarji, Subordinate Judge of Ghâzipur, dated the 19th November, 1883, affirming a decree of Maulvi Syed Zamulabdin, Munsif of Muhammadabad, Koranta-dih, dated the 31st July, 1883.

Per PETHERAM, C.J., that the terms of the *wajib-ul-arz* meant that if any co-sharer transferred his right wholly or partly, the right of pre-emption should arise; that, although the legal interest in the share was never transferred, the effect of the transaction in question was to transfer absolutely the whole right of possession from the vendor to the vendee, and that it was therefore such a transfer as let in the right of pre-emption.

Per STRAIGHT, J., that inasmuch as the defendants deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right, it was very doubtful whether a Court of equity would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law.

Per OLDFIELD and BRODHURST, JJ., that the failure of the parties to the transfer to comply with the requirements of s. 54 of the Transfer of Property Act (IV of 1882), as to the manner in which the transfer should be made, did not alter the nature of the transaction or affect the fact that a sale had been made, and could not affect a pre-emptor's right in respect of it.

Per MAHMOOD, J., that a valid and perfected sale was a condition precedent to the exercise of the pre-emptive right; that, in the present case, nothing had happened which could properly be termed a "sale" within the meaning of the *wajib-ul-arz;* that the application for mutation of names not having been registered, the provisions of s. 54 of the Transfer of Property Act prevented it from taking effect as a sale, or passing the ownership from the vendor to the vendee; and that therefore, under the *wajib-ul-arz,* the right of pre-emption could not arise.

THE plaintiffs in this case, alleging that they were co-sharers in a certain village, that on the 15th August, 1883, the defendant Rameshar Misr, in contravention of the terms of the *wajib-ul-arz,* sold a share of two annas and a fraction to the defendant Janki Misr, for Rs. 300, and, in order to avoid pre-emption, did not execute a sale-deed, but got mutation of names effected in the Revenue Department, sued for possession of the share in question, on payment of Rs. 300, or whatever sum the Court might fix. The *wajib-ul-arz,* on which the suit was based, provided as follows:— "If any one wishes to transfer his share, wholly or partly, by sale or mortgage, he must mortgage it to one of the shareholders of the village, or sell it to him for the fixed price. If they refuse to take it, or to pay a proper price, he is at liberty to sell or mortgage it to any one he likes; should he transfer his share to a stranger without giving information to the shareholders of the village, the transfer shall be invalid." Both the lower Courts found that the share in question had been sold by the defendant Rameshar to the defendant Janki, a "stranger," for Rs. 300, and

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that a sale-deed had not been executed in order to avoid pre-emption.

It was urged before the lower appellate Court that under s. 54 of the Transfer of Property Act a sale of immoveable property of the value of Rs. 100 and upwards could be made only by a registered instrument, and that there being in this case no registered instrument, there was no "sale," and therefore the right of pre-emption did not arise. Upon this point the Court observed as follows:—"This contention cannot, in my opinion, hold water, because, otherwise, it would be easy for a vendor and vendee to enter into a combination successfully to defeat claimants for pre-emption. The fact that the vendor and vendee fraudulently omitted to evidence the *de facto* transfer by sale by a registered instrument cannot deprive the plaintiffs of their claim for pre-emption."

In second appeal the defendant Janki again contended that there was no "sale," and therefore no right of pre-emption had accrued. The Divisional Bench (PETHERAM, C. J., and MAHMOOD, J.) hearing the appeal referred the case for decision to the Full Bench.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Mr. *G. T. Spankie*, for the respondents.

The following judgments were delivered by the Full Bench:—

MAHMOOD, J.—I regret that in this case I am unable to take the same view as the learned Chief Justice and the other members of the Court. The suit was instituted to enforce the right of pre-emption founded upon the specific terms of the *wajib-ul-arz* of the village in which the property in dispute is situate; and it was based on the ground that the effect of an application dated the 15th August, 1882, was to transfer the ownership of the property to a person whom, for the sake of convenience, I shall call the "vendee." This application was made in the Revenue Court for mutation of names, and its object was to substitute the name of the so-called vendee for that of the so-called vendor as owner of the share, on the allegation that the latter being a member of the same family had an original share in this property, though his

name was not recorded. The question now before us is, whether this transaction was of such a nature as to afford a cause of action upon which a suit to enforce pre-emption may be brought?

I take it to be a fundamental principle relating to the exercise of the pre-emptive right that it cannot be enforced upon a sale which is invalid and can take no effect, but that it can be enforced when, under a valid sale, and according to the rules of law, the owner has been divested of the proprietary title and the purchaser invested with it. This rule might be amply supported by authorities upon the Muhammadan Law of pre-emption which, as I have frequently said, must, by equitable analogy, be followed in cases like the present. It appears to me that in the present case nothing has happened which can properly be termed a "sale" within the meaning of the *wajib-ul-arz*. Mr. Spankie has argued that inasmuch as the *wajib-ul-arz* was framed in 1848, it must be construed with reference to the law then in force, and not with reference to s. 54 of the Transfer of Property Act, which came into force on the 1st July, 1882. It is a recognised rule of construction that the words used in any document must be understood in their ordinary sense, unless there are words suggesting a different meaning; and although in 1848 neither the Transfer of Property Act nor the Registration Act was in existence, it appears to me that the word "sale" could not at any time have borne a different meaning from that which has now been assigned to it by the Legislature—that is to say, "a transfer of ownership in exchange for a price paid or promised, or part paid or part promised." This is not any new definition: it is merely a repetition of what has long been the law. Now it may well be that in 1848 this "transfer of ownership in exchange for a price" might have been effected orally, or by other means than that now provided; but I confidently assert that the conception of "sale" and the meaning of the word has not altered. The law says that such a transfer, in order to take effect, must be executed by a written document registered according to the law for the time being in force. S. 17 of the Registration Act (III of 1877), read with s. 49 of the same Act, leaves no doubt that if such a transaction as that now in question were effected by a written document, the value of the property exceeding Rs. 100, the document must, in order to affect

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immoveable property, be registered; because s. 49 provides that "no document required by s. 17 to be registered shall affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property, unless it has been registered in accordance with the provisions of this Act."

Now, if the application of the 15th August, 1882, amounted to a "sale," it it is obvious that, not having been registered, it could, not, as a matter of law, affect the property in suit. If the transaction were a mere oral matter, and the application a mere repetition of it, then s. 54 of the Transfer of Property Act prevents it from taking effect as a sale, or from passing the ownership from the vendor to the vendee, and therefore, under the *wajib-ul-arz*, the right of pre-emption cannot arise. Mr. Spankie argued that the proper interpretation of the *wajib-ul-arz* is, that it gives a right of pre-emption upon transfers of all kinds, including even a transfer not of the whole of the incidents constituting ownership, but of some of those incidents only. I cannot agree with this view, because the interpretation of this *wajib-ul-arz* must be limited to the words used therein, and the only transactions there mentioned are "sale" and "mortgage." The transaction now in question is neither the one nor the other.

There appears to be nothing in the Transfer of Property Act which prevents any one from entering into a contract for sale of the nature mentioned in the penultimate paragraph of s. 54 by parol or by an unregistered document. It has been said that such a contract might be made the basis of a suit for specific performance by the present vendee against the vendor; and that a decree for specific performance having been obtained, it would then operate in derogation of the pre-emptor's right. Now, in the first place, such a contract may never be enforced, and if it is enforced, then such a decree could only result in a sale-deed properly executed in reference to s. 54, and whenever that was done, and a valid sale and consequent transfer of ownership were effected, then, and not till then, this right of pre-emption would come into force. "Contract for sale" is defined in the last part of s. 54 of the Transfer of Property Act, which clearly lays down that such a contract "does not, of itself, create any interest in or charge on such pro-

perty," and in my opinion it falls under the category of "obligation arising out of contract and annexed to the ownership of immoveable property" within the meaning of the last two paragraphs (*vide* Illustration) of s. 40 of that Act—an obligation which cannot be enforced against a transferee for value without notice.

If a valid and perfected sale were not a condition precedent to the exercise of the pre-emptive right, consequences would follow which the law of pre-emption does not contemplate or provide for. In this very case, supposing the so-called vendor, notwithstanding the application of the 15th August, 1882, (which cannot amount to an estoppel under the circumstances), continues or re-enters into possession of the property, it is clear that the so-called vendee would have no title under the so-called sale, to enable him to recover possession—the transaction being, by reason of s. 54 of the Transfer of Property Act, ineffectual as transfer of ownership. The right of pre-emption being only a right of substitution, the successful pre-emptor's title is necessarily the same as that of the vendee, and if the vendee took nothing under the sale, the pre-emptor can take nothing either; and it follows that if the vendee could not oust the vendor, the pre-emptor could not do so either, because in both cases the question would necessarily arise whether the sale was valid in the sense of transferring ownership. Again, if notwithstanding a pre-emptive suit such as this, the so-called vendor, who has executed an invalid sale which does not in law divest him of the proprietary right, subsequently executes a valid and registered sale-deed in favour of a co-sharer other than the pre-emptor, or in favour of a purchaser for value without notice of the so-called contract for sale, it is difficult to conceive how the pre-emptor, who has succeeded in a suit like the present, could resist the claim of such purchaser for possession of the property. And the anomaly would become further prominent if such purchaser is a "stranger," for in that case the only way in which the successful pre-emptor like the present could obtain the property would be by bringing another suit, with respect to the *valid* sale, for pre-empting property which *ex hypothesi* belongs to himself. In my opinion, in cases like the present the turning point of the decision depends upon the answer to the question whether the proprietary title has validly passed from the vendor to the vendee, and

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the pre-emptive suit will lie or not lie according as the answer is in the affirmative or the negative. In the present case there is no doubt in my mind that the proprietary title still vests in the so-called vendor, and he may still deal with it as he likes, by sale, or mortgage, or otherwise; and it follows therefore that no cause of action has arisen for a pre-emptive suit under the *wajib-ul-arz*, the transaction of the 15th August, 1882, being neither a *sale* nor a *mortgage* within the meaning of that document. On the other hand, even if that transaction is to be treated as a contract for sale, I should say that the suit was premature.

For these reasons I would decree the appeal, and, reversing the decisions of both the lower Courts, dismiss the suit with costs to be borne in all Courts by the respondents.

PETHERAM, C. J.—I think that in this case the right of pre-emption does arise, and that the judgments of the lower Courts were right. The facts of the case are very simple. A co-sharer in a village entered into a transaction for the sale of his share in consideration of Rs. 300, and in pursuance of this transaction the Rs. 300 were paid, and the vendee obtained possession, but no transfer under the Transfer of Property Act was executed or registered, and consequently the legal interest was never transferred from the vendor to the vendee. But the vendee paid the purchase-money and got possession; he was entitled to possession and to bring an action against the vendor for specific performance of the contract for sale, and to obtain an actual transfer of the legal estate, which could then be registered. These rights he might enforce either at once, or, if attacked by the vendor, by way of defence and counter-claim. The effect of the transaction was therefore that a co-sharer transferred the right to possession, and gave possession to the vendee. The question then is—Does such transfer let in the right of pre-emption? The *wajib-ul-arz* provides as follows:—"If any one of us wishes to transfer his share wholly or partly, by sale or mortgage, he must mortgage it to one of the share-holders of the village, or sell it to him for the fixed price. If they refuse to take it or to pay a proper price, he is at liberty to sell or mortgage it to any one he likes; should he transfer his share to a stranger without giving information to the shareholders

of the village, the transfer shall be invalid." Now, it will be observed that after "partly," the words "by sale or mortgage" occur; and these words were obviously meant to extend the effect of the preceding words, and they appear to me to mean that if any co-sharer transfers his right wholly or partly, the right of pre-emption is to arise. The effect of the transaction now in question was to transfer absolutely the whole right of possession to the vendee, and therefore it appears to me to come within the meaning of the *wajib-ul-arz*, and to give rise to the right of pre-emption,

STRAIGHT, J.—I am of the same opinion, and have only a few words to add. It has been found as a fact by both the lower Courts that the defendants in this case, the vendor and the vendee, intended the transaction between them to be a transaction of sale, that consideration passed, and that the vendee was put into possession. From these facts, it seems to me, the inference is irresistible that they deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right of the plaintiff. This being the case, I entertain very grave doubts whether this Court, as a Court of equity, would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law, and, speaking for myself, I should hesitate long before countenancing it. In reference to the observations made by my brother Mahmood in the course of the argument, I fail to see how, if the vendor were to sue to recover possession of the share upon the basis that no written instrument had been executed, he could succeed, because consideration having been paid and possession obtained, the vendee would have a good answer. As I said before, however, I concur with the reasoning and conclusion of the learned Chief Justice, and would dismiss the appeal with costs.

OLDFIELD, J.—I am of the same opinion. The Courts below have found as a fact that Rameshar was the owner of the property and transferred it to Janki Misr, appellant, for valuable consideration. This transaction amounts to a sale in fact, on which the right of pre-emption comes into operation. S. 54, Transfer of Property Act, no doubt requires that a sale of this kind shall be made by registered instrument, which has not been done in this

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case, but the failure of the parties to the sale to comply with the requirement of the Act as to the manner in which the transfer shall be made by the parties does not alter the nature of the transaction, or affect the fact that a sale has been made, and cannot defeat a pre-emptor's right in respect to it. I would therefore dismiss the appeal.

BRODHURST, J.—On the findings of fact arrived at in the concurrent judgments of the lower Courts, it is established that Rameshar Misr sold and transferred the share in suit to Janki Misr for Rs. 300, and though, with the object of defeating the right of pre-emption, a deed of sale was not executed in accordance with the provisions of s. 54 of the Transfer of Property Act, there nevertheless was a transfer by sale, and under the *wajib-ul-arz* the plaintiffs have a right of pre-emption, and consequently I would dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

ROHILKHAND AND KUMAUN BANK, LIMITED (PLAINTIFF) *v.* ROW (DEFENDANT).*

Minor, suit against—Civil Procedure Code, s 443—Majority, age of—European British subject not domiciled in India—Act IX. of 1875 (*Majority Act*)—*Contract—Lex loci—Act IX of* 1872 (*Contract Act*), *s.* 11—*Cheque—Liability of indorser—Act XXVI of* 1881 (*Negotiable Instruments Act*), *ss.* 35, 43.

A cheque was indorsed in blank by a European British subject who, at that time, was under twenty years of age, and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured, and a suit was then brought by the bank which had cashed the cheque, to recover the amount from the indorser and the drawer. The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was a mere matter of form, and he would not be liable for the amount, and that the bank would only cash the cheque when indorsed by him, and in consequence he consented to indorse it, but that he did so without any intention of incurring liability as indorser, that he received no consideration, and that his indorsement was in blank, and not in favour of the bank, and was converted into a special indorsement without his knowledge and consent. The Court held that, at the time of indorsement, the indorser was a minor under English law, and dismissed the suit on the ground of minority.

Held that if the Court was satisfied of the fact of the defendant's minority, it should have complied with the provisions of s. 443 of the Civil Procedure Code.

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* First Appeal No 60 of 1883, from a decree of T. B. Tracy, Esq., District Judge of Bareilly, dated the 27th February, 1883.

Held that, assuming the indorser to have been *sui juris*, the indorsement, taken in conjunction with the facts proved, established a contract by which the indorser was bound to pay the cheque.

Per STRAIGHT, Offg. C. J., and DUTHOIT, J., that it was by no means clear or certain that there was any rule of international law recognizing the *lex loci contractus* as governing the capacity of the person to contract, but that, assuming such a rule to be established, the specific limitation of the Indian Majority Act (IX of 1875) to "domiciled persons" necessarily excluded its application to European British subjects not domiciled in British India; that s. 11 of the Contract Act must be interpreted as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law wherever such law was to be found; that this rule was not affected by the Majority Act so far as concerned persons temporarily residing but not domiciled in British India, whose contractual capacity was still left to be governed by the personal law of their personal domicile; and that such law in the case of European British subjects was the common law of England, which recognized twenty-one as the age of majority.

Per OLDFIELD, J., that by the rule of the *jus gentium* as hitherto understood and recognized in England, the *lex loci* would govern in respect to the capacity to contract, but that in framing the Indian Majority Act, which was the *lex loci* on the subject in India, the Legislature would appear not to have adopted that rule, but by limiting the operation of the Act to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile.

Per BRODHURST, J., that Act IX of 1875 was intended by the Legislature to be applicable, and in fact was applicable, only to European British subjects domiciled in those parts of India referred to in s. 1, and that to any other European British subject whose domicile was in England, but who was temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attached until he had attained the age of twenty-one years.

THIS was an appeal which was first heard by Oldfield and Brodhurst, JJ., and which in consequence of a difference of opinion between those learned Judges on a point of law was subsequently referred to Straight, Offg. C. J., and Duthoit and Mahmood, JJ., and the Judges who first heard it. The facts of the case are fully stated in the first judgment of Oldfield, J.

The judgment of the Judges who first heard the case were as follows:—

OLDFIELD, J.—This is a suit by the Rohilkhand and Kumaun Bank against Lieutenant Row and Lieutenant Fraser, to recover the amount of a cheque with interest.

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The cheque was drawn on the 29th April, 1882, by Lieutenant Fraser upon Messrs. Cox and Company, in favour of Lieutenant Row or bearer, and indorsed in blank by Lieutenant Row, and delivered by him to Lieutenant Fraser, who transferred it to the Rohilkhand and Kumaun Bank, and the blank indorsement was converted into a special one by superscribing above the indorsement the words "Pay to Rohilkhand and Kumaun Bank, Limited, or order." The cheque was cashed by the Bank, and the money paid to Lieutenant Fraser. It was subsequently dishonoured, and notice given to defendants.

Lieutenant Fraser did not appear to defend the suit, and a decree was made against him *ex parte*. Lieutenant Row pleaded that he did not indorse the cheque with the intention of incurring liability as indorser, that he received no consideration, and that his indorsement was in blank, and not in favour of the Bank, and converted into a special indorsement without his knowledge and consent.

There was no plea that Lieutenant Row was a minor at the time he indorsed the cheque, but the Judge has found that he was at that time under twenty, and has held him to be a minor under English Law, and that he also was a minor by that law at the time the suit was proceeding, and the Judge considered it incumbent on him to consider the fact of minority in deciding on his liability, and, so far as I understand his judgment, he has dismissed the suit on the ground of his minority, and because no consideration was received by Lieutenant Row.

The appeal is instituted on the part of the Bank against the decree dismissing the suit against Lieutenant Row. Before proceeding further I must observe that if the Judge was satisfied that the respondent was a minor when the suit was instituted, he should not have allowed it to proceed without steps being taken to have the respondent properly represented.

The first point which I have to consider is the question of minority; for although this plea was not taken in the Court below, it has been a material ground for the Judge's decision, and it becomes necessary for me to decide it, both as having regard to the question of the respondent's capacity to defend the suit and the regularity of

the trial, and his capacity to incur obligation by indorsing the cheque.

I am of opinion that the age of majority must be determined by Act IX of 1875, and that as the respondent was eighteen when he indorsed the cheque and when the suit was instituted, he had obtained the age of majority. Act IX of 1875 is the Indian Majority Act, and by its provisions the age of majority of British subjects domiciled in British India is eighteen years, except in cases where a guardian of a minor's person and property has been or shall be appointed by any Court of Justice, or where the minor is under the jurisdiction of any Court of Wards—exceptions which do not apply to the respondent.

Act IX of 1875 is the *lex loci* on the subject for British India, and was expressly introduced to remedy the uncertainty then existing as to the age at which majority was obtained, and at which persons could contract and incur responsibilities, and to relieve persons contracting with foreigners from the necessity of looking further than the Act to ascertain the age of majority. The Act in terms applies to all British subjects domiciled in India, but it is unnecessary for us to consider whether or not the respondent's domicile is in British India; for, if it be not, he is made subject to that law by the *jus gentium*, by which, on grounds of mutual convenience, the age of majority is to be determined by the *lex loci contractus aut actus*. The rule is stated in Story's *Conflict of Laws*, 7th ed., s. 101 (1):—"The capacity, state, and condition of persons, according to the law of their domicile, will generally be regarded as to acts done, rights acquired, and contracts made, in the place of their domicile touching property situate therein. If these acts, rights, and contracts have validity there, they will be held equally valid everywhere. If invalid there, they will be held invalid everywhere. S. 102 (2):—As to acts done, and rights acquired and contracts made in other countries, touching property therein, the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons." And s. 103 (3):—"Hence we may deduce, as a corollary, that in regard to questions of minority or

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majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made or the act done." See also Tudor's Leading Cases on Mercantile Law, p. 228—*Don* v. *Lippman*. The respondent was of age by the *lex loci*, and neither the contract nor the proceedings in the lower Court are vitiated.

It remains for me to determine the liability of the respondent. The cheque has admittedly been dishonoured, but liability as indorser to the Bank, the holder of the cheque, is denied on the ground that the respondent did not indorse the cheque with the intention to take the liability as an indorser, and received no consideration for it. The pleas are, however, not maintainable.

By s. 35 of the Negotiable Instruments Act, in the absence of any contract to the contrary, whoever indorses or delivers a negotiable instrument before maturity without in such indorsement expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor, or maker, to compensate such holder for any loss or damage caused to him by such dishonour, and the respondent's liability is clear from his own statement of the circumstances under which he indorsed the cheque. He states that Lieutenant Fraser brought him the cheque and asked him to sign his name to it, saying that it was a mere matter of form, and he would not be liable for the amount, and explaining that the Bank would not cash his cheque unless it was made payable to some other officer, and in consequence he consented to indorse it. On his own showing, therefore, he indorsed the cheque with the intention of benefiting or accommodating Lieutenant Fraser, by enabling him to raise money on it by means of the indorsement, and he cannot escape liability to the plaintiff. It is immaterial that he received no consideration; he indorsed the cheque in blank and delivered it to Lieutenant Fraser, and the Bank paid the amount to Lieutenant Fraser. The respondent put his name without consideration for the purpose of accommodating Lieuten-

ant Fraser, and his not receiving consideration affords no defence as against the Bank which gave value for the cheque—see s. 43, Negotiable Instruments Act. Nor does the conversion of the blank indorsement into a special one in favour of the Bank affect the liability of the respondent Lieutenant Row.

The decree of the lower Court should therefore be modified and the appeal be decreed, and the claim be decreed against the respondent with all costs and interest at six per cent. from the date of the institution of the suit to realization.

BRODHURST, J.—The facts of this case are contained in the judgment of the lower Court; they are also fully stated in the judgment of my colleague Mr. Justice Oldfield, and they are not disputed, and I therefore shall not repeat them.

Lieutenant Row at the time he indorsed the cheque was within two months of his 20th birthday, and in June, 1883, or four months after he gave his evidence in this case, he became 21 years of age. He admits that Lieutenant Fraser had informed him "that the Bank would not cash his cheque unless it was made payable to some other officer," and that he nevertheless indorsed the cheque. He ought to have known that if the Bank would only cash the cheque when made payable to him and indorsed by him, his indorsing it could not be a mere matter of form, and the result of his act was, that the cheque was cashed, and the Bank has been compelled to institute this suit to recover the amount thus paid, together with interest and costs.

If Lieutenant Row had attained majority at the time he indorsed the cheque, he by that indorsement rendered himself liable for payment of the amount; and if he objected to plead minority, he should, I think, have defrayed the claim.

I agree with Mr. Justice Oldfield, that if the Judge was satisfied that Lieutenant Row was a minor, he should not have allowed the suit to proceed without having the minor properly represented. In fact, the Judge should, I think, have complied with the provisions of s. 443 of the Civil Procedure Code.

The Indian Majority Act No. IX of 1875 is, I am inclined to think, inapplicable to this case. It was not enacted to reduce the period of nonage of any persons—European British subjects or

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others—residing in British India, but on the contrary it was enacted "to prolong the period of nonage of persons domiciled in British India, and to attain more uniformity and certainty respecting the age of majority than now exists."

A very large proportion of the European British subjects in India, and forming by far the most important section of that class are those who are not domiciled in the country but are only temporarily residing in it.

Act IX of 1875 obviously applies merely to such European British subjects as are domiciled in British India, or in the states and dominions referred to in s. 1 of the Act, and the age of majority of European British subjects temporarily residing in British India, but whose domicile is in England, would not, in my opinion, be attained until the age of 21 years, and that this was believed by the plaintiffs-appellants to be the case appears clear from the evidence of their agent, who deposed.—"We were not aware that Lieutenant Row was a minor. We should not have accepted his name had we known."

It is often the case that British officers, shortly after they are 18 years of age, leave England to join British Regiments in India, and they may, and probably often do, return to England with or without their regiments when they are still under 21 years of age. That such officers should be considered in India to have attained majority, and should subsequently, on arrival in England, be regarded as minors would be anomalous and inconvenient.

I consider, then, that Act IX of 1875 was intended by the Legislature to be applicable, and in fact is applicable, only to European British subjects domiciled in those parts of India referred to in s. 1, and that to any other European British subject whose domicile is in England, but who is temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attach until he has attained the age of 21 years.

The law of domicile as applicable to British India is contained in Part II. of the Indian Succession Act, No. X of 1865.

As Act IX of 1875 is, in my opinion, inapplicable to this case, unless Lieutenant Row is domiciled in British India, I would re-

mand the case to the lower Court for a finding as to the domicile of Lieutenant Row, and when he attained the age of majority.

On the hearing of the case before the Full Court,

Mr. *C. H. Hill*, for the appellant.

Mr. *A. S. Reid*, for the respondent.

The following judgments were delivered by the Court:—

STRAIGHT, Offg. C. J., and DUTHOIT, J.—We understand it to be admitted that the defendant Row, at the time he indorsed the cheque and when the present suit was heard and decided, had not attained the age of 21 years. It therefore follows as a necessary consequence that if he was incapable of making a valid and binding contract when he wrote the indorsement on the cheque, no suit was maintainable against him in his own person, and the proceedings of the Court below, in treating him as a competent party thereto, were contrary to law. If the Judge was satisfied, as he appears to have been, of the fact of his minority, it was obligatory upon him to follow the directions laid down in s. 443 of the Civil Procedure Code. Not having done so, the defendent Row was "*coram non judice*," and the trial was, so far as it concerned him, abortive. The whole case is before us under the order of reference, and there is a question involved in it of how far, assuming the defendant Row to have been *sui juris*, the indorsement itself, taken in conjunction with the facts proved, established a contract by which he was bound to pay the cheque. As to this, we think it sufficient to say that we concur in the views expressed by Oldfield and Brodhurst, JJ., that a liability in law was created. But it seems to us that the primary and crucial point which must be determined is, was the defendant Row, on the 29th of April, 1882, when he indorsed the cheque as surety for Fraser, legally competent and capable of entering into a binding obligation on his own behalf, which could be enforced in a Court of Law? If he was not, then the Bank had no right to proceed against him. Now, it will, we think, be conceded, that prior to the passing of the Contract Act in 1872, save for the purposes of special Acts declaring to the contrary, the Indian subjects of the Crown were, as regards their age of majority as affecting legal liability, governed by their own personal law, that is to say,

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Hindus by the Hindu Law, Muhammadans by the Muhammadan Law. So European British subjects, except in so far as had been affected by legislation, were, if we may accept the *dictum* of Turner and Spankie, JJ., in *Hearsey* v. *Girdharee Lal* (1), held not only in the Presidency Towns, but in the Mufassal, to continue minors until attaining the age of 21 years. The following are the remarks upon the subject used by those two learned Judges:—"There being no express enactment determining the age at which a European British subject is to be held to have attained majority in this country, so as to be capable of making a contract, we feel ourselves bound to follow the established rule of the Courts, and to hold that the privileges and disabilities of minority (so far as they are not removed by express enactment) attach to a European British subject until he has attained the age of 21 years." Such appears to have been the state of the law when s. 11 of the Contract Act was passed, and it is therein provided that "every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." This was no more than a reduction into terms in the body of the statute of the unwritten rules which had theretofore guided and governed the action of the Courts. And it was admitted by the learned counsel for the appellant, that up to the enactment of the Indian Majority Act, 1875, twenty-one was the age which governed the *status* of majority of European British subjects domiciled in India. By the Indian Majority Act, 1875, it was declared that "every person," save as therein otherwise provided, "domiciled in British India, shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before." This Act, therefore, not only fixed the majority of Hindus and Muhammadans alike at eighteen, but applied the same rule to all other subjects of the Crown who were *domiciled* in British India. The words are clear and specific, and the preamble of the Act in terms confines its operation to "the case of persons domiciled" in British India. It was also conceded by the learned counsel for the appellant Bank, that the defendant Row, whatever his domicile was, had not a domicile in this country. It is, therefore, clear that,

(1) N.-W. P. H. C. Rep., 1871, p. 338.

standing by itself and without the aid of any rule of international law, the last mentioned Act cannot apply to him.

As the argument that the *lex loci contractus* must determine the contractual capacity, it is to be observed that, though American and English authorities have expressed opinions on the question at variance with those of "foreign jurists, who generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract" (Story's *Conflict of Laws*, 7th ed., s. 241), two of the latest English writers on the subject seem to speak with uncertain sound as to whether such a rule can be unreservedly laid down (Dicey *On Domicile*, p. 177. Westlake's *International Law*, p. 46). In *Udny* v. *Udny* decided by the House of Lords in 1869 (1) Lord Westbury remarks:—" The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority, or minority, his marriage, succession, testacy, or intestacy, must depend." And a like view was expressed by Cotton, C. J., in *Sottomayor* v. *De Barros* (2). It is therefore by no means so clear or certain that there is any rule of international law which recognises the *lex loci contractus* as governing the capacity of the person to contract; but conceding for the moment it does, it nevertheless seems to us that the specific limitation of the provisions of the Act of 1875 to "domiciled persons" necessarily excludes its application to European British subjects generally. For it will not, we think, be denied, that the Legislature of this country, had it been so minded, might have extended the operation of the Majority Act to all European British subjects indiscriminately, and irrespective of any question of domicile, upon the same principle as it had framed and passed Act XIII of 1874, relating to European British minors in certain parts of India. But it did not do so. On the contrary, from the introduction of the Bill in the first instance, to the time of its passing into law, the obvious aim and object of the measure was to secure greater uniformity in the age of majority of persons domiciled in British India, and to raise it in

(1) L. R., 1 H. L., S. & D., 441. (2) L. R., 3 P. D. 1.

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those cases where it was too low. It did not, however, profess or attempt to deal with a continually fluctuating and frequently changing body of persons, namely, European British subjects temporarily residing in the country, who, to use the terms employed in s. 10 of the Indian Succession Act, have no "fixed habitation" here. It seems to us, therefore, as regards such last mentioned persons, still conceding the *lex loci contractus* to be applicable to them, that the only other provision of Indian Law which is germane to the matter, is the provision contained in s. 11 of the Contract Act already adverted to—"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Applying to language its ordinary meaning, we can only interpret this section as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law, whether such law was to be found in the Shastras, the Shara, the Acts of the Indian Legislature, or any other law, according as each particular case called for its application. The rule thus laid down was likely to be, and possibly proved, an inconvenient one in practice, and so far as persons domiciled in British India are concerned, it has now been corrected by Act IX of 1875. But, as we have before pointed out, such last mentioned Act did not touch persons temporarily residing, but not domiciled, in British India, and we think that it must therefore be taken that their *status* to contract was still left to be governed by the law to which they were subject—*i. e.*, the personal law of their personal domicile. Such law in the case of European British subjects is the common law of England, which recognizes twenty-one as the age of majority, and in our opinion such is the law which in the case before us, if the defendant Row's domicile, or rather that of his father, was in England when he was born, must govern its decision. Although it is admitted that the defendant Row was not domiciled in British India, it is not admitted that his father, at the time of his birth, had his domicile in England, and we cannot finally dispose of the matter without a distinct finding upon this point.

We therefore remand the following issue under s. 566 of the Civil Procedure Code for a finding by the lower Court:—"What

was the domicile of the father of the defendant Row at the date of his birth?"

OLDFIELD, J.—On further consideration, I am induced to alter the opinion which I formed when this case came before the Divisional Bench, that the capacity to contract with reference to age of persons not domiciled in British India should be governed by the Indian Majority Act as the *lex loci* on the subject.

By the rule of the *jus gentium* as hitherto understood and recognized in England, the *lex loci* would govern in respect to the capacity to contract (Story's *Conflict of Laws*, 7th ed., ss. 100 to 103, and 241), and I was disposed to assume that the Indian Legislature had intended the same rule to have force in British India but in framing the Indian Majority Act (Act IX of 1875) which is the *lex loci* on the subject in this country, the Legislature would appear not to have adopted that rule, but by limiting the operation of the Act to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile. On this view, the Act will not affect such persons. I concur in the order of remand proposed by my colleagues.

BRODHURST, J.—At present I see no reason to doubt that the conclusions arrived at in my judgment of the 14th March last were correct, and I do not wish to add anything further than that I concur with my learned colleagues in remanding the case to the lower Court for a finding on the proposed issue.

MAHMOOD, J.—I agree with my honorable colleagues in the view that if the defendant-respondent Row be taken to have been *sui juris* when he indorsed the cheque, the facts proved in this case render him liable to the claim.

Reserving, however, for the present my opinion as to the law which would govern his age of majority for contractual capacity within the meaning of s. 11 of the Indian Contract Act (IX of 1872), I concur with my honorable colleagues in remanding the case to ascertain the exact domicile of the defendant-respondent Row,

Cause remanded.

P. C.
1884

December 11.

PRIVY COUNCIL.

RAM DIN (PLAINTIFF) v. KALKA PRASAD (DEFENDANT).*

[On appeal from the High Court for the North-Western Provinces.]

Limitation—Act IX of 1871 (Limitation Act), sch. ii., arts. 65 and 132—Periods respectively applicable to personal demands, and to claims charged on immoveable property.

That there is a personal liability upon an instrument charging a debt upon immoveable property, does not carry with it the effect that the period of limitation fixed for personal demands by Act IX of 1871 is extended; by reason of this demand being, thereby, brought within the meaning of art. 132 of sch. ii of that Act, which applies to claims "for money charged upon immoveable property."

A mortgagee of lands sought, after the lapse of more than six years from the date when the mortgage money was payable, to enforce two distinct remedies, the one against the property mortgaged, and the other against the mortgagor personally, on the contract to repay the mortgage-money.

Held that art. 132, above-mentioned, applied only to suits to raise money charged on immoveable property, out of that property; and that the twelve years' bar did not apply to the personal remedy, as to which the shorter period prescribed in art. 65 of the same schedule applied.

APPEALS consolidated and heard as one, from decrees (4th August, 1881) of the High Court reversing decrees (2nd December, 1880) of the District Judge of Farukhabad, which reversed decrees, (24th September, 1880) of the Subordinate Judge of Farukhabad, and restoring the latter.

The appellant, Ram Din, together with one Ganesh Singh, who died during the pendency of these appeals, jointly instituted two suits in the Court of the Subordinate Judge of Farukhabad against the respondent, Kalka Prasad, upon two several mortgage-bonds to recover the amounts due thereon, for principal and interest, out of the immoveable property thereby mortgaged, and also to recover the same from the mortgagor personally.

The respondent by the first mortgage, dated the 25th January, 1870, mortgaged to Ram Din and Ganesh Singh, his interest in a mauza in pargana Kanauj to secure repayment of Rs. 1,300, with interest at one per cent. per mensem, on the 13th June, in that year. By the second mortgage he charged his pakka house in Makrannagar, pargana Kanauj, with Rs. 900, repayable in a

* *Present*:—Lord FITZGERALD, Sir B. PEACOCK, Sir R. P. COLLIER, Sir R. COUCH, and Sir A. HOBHOUSE.

year, at the same interest. By both the mortgage instruments the mortgagor agreed that in default of payment at due date, the mortgagees should be at liberty to sue for their whole money in a lump sum, from the mortgagor personally; as well as to realize it from the mortgaged property. Neither bonds having been paid, these suits were brought on the 21st and 23rd August, 1880, respectively. Besides other defences not now material, the defendant, in each of the suits, contended that no decree could be made against him personally, more than six years having elapsed from the date of execution of the bonds.

The Subordinate Judge in his judgment remarked that the suit contained two distinct claims; the one, a claim against the immoveable property mortgaged, to which claim twelve years' limitation applied; the other a claim against the defendant personally, to which the limitation of six years was applicable. He held that the latter claim was barred. The money was due in 1870, and the suit was brought in 1880. The decree must, therefore, be limited to money to be obtained by the sale of the property mortgaged; the defendant's estate, not mortgaged, being exempted.

On appeal, the District Judge of Farukhabad reversed this decision, holding that in the case of a bond stipulating, not merely for the personal security of the debtor, but also charging the immoveable property mentioned therein, the period of limitation was twelve years under art. 132; and that therefore the decree could be not only against the mortgaged property, but also to enforce the personal liability.

The High Court (SIR R. STUART, C. J., and TYRRELL, J.) held, on a second appeal, that in this suit the plaintiff could enforce the debt against the immoveable property upon which it was charged, but not against the defendant personally. Accordingly, the decree of the first Court was restored.

On this appeal,

Mr. *R. V. Doyne*, appeared for the appellant, Ramdin, who proceeded as surviving joint plaintiff.

The respondent did not appear.

For the appellant the question,—were the decrees, and consequently execution, to be limited to the mortgaged property, or to

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extend to the personal estate of the defendant—was argued. The period fixed in art. 132 applied to the remedy, which was two-fold, the borrower having chosen to give a security which could only have one period of limitation, *viz*, the 12 years' bar. There was but one cause of action, and to this but one rule of limitation could apply. Reference was made to *Mannu Lal* v. *Pigue* (1).

After the argument for the appellant had been heard, their Lordships' judgment was delivered by

LORD FITZGERALD.—This is a suit instituted by the mortgagee against the mortgagor. He seeks to enforce a mortgage not under seal dated 25th January, 1870, by which certain property was pledged to him for a mortgage debt; he alleges that the defendant has failed to pay both principal and interest, and prays that the principal and interest may be enforced against the mortgaged property, and also by rendering the person of the defendant and his other property liable. Therefore, although it is a mortgage suit, there are two distinct remedies sought, one against the mortgaged property, and the other by rendering the other property and the person of the defendant liable. The defendant does not dispute the mortgage. He raises no question as to the right of the plaintiff to have the mortgaged property sold, but he says that the remedy sought against him personally, and against his other property, is barred by the operation of the Limitation Act of 1871.

Their Lordships turn then to see what the mortgage transaction was. It is very plain and very simple. The instrument recites the mortgage of certain property for Rs. 1,300 to the present plaintiff, that the interest should be at the rate of one per cent per mensem, and the principal and interest to be repaid at the end of Jaith Sambat 1927. The instrument then says.—" I have received the mortgage money in full. I therefore covenant that if I fail to pay the principal with interest on the promised date, the mortgagees will be at liberty to recover through Court their whole money in a lump sum from me or the mortgaged property." The mortgagor thus gives the mortgagee a pledge of certain fixed immoveable property, and also gives as a further security his personal

(1) 9 B. L. R., 175, in note, 10 W. R, 379.

bond or covenant. A period of nearly ten years elapsed from the time at which the mortgage-money with interest became payable before the suit was instituted. The question submitted for their Lordships' consideration is, whether the lesser period of limitation, three or six years as the case may be, has barred the personal remedy against the mortgagee, even though the mortgage remains in full force, as against the mortgaged property.

Their Lordships are of opinion that the judgment of the High Court is correct. The Judge of the primary Court held that the personal demand was barred. The Judge of the District Court held the contrary—that there could be but one period of limitation, and that was a period of 12 years, applicable to the mortgage of fixed property, which carried with it and gave the same 12 years for the enforcement of the personal security. Their Lordships are of opinion that the District Judge is wrong in point of law. There are two remedies distinctly sought in the plaintiff's petition, the one against the mortgaged property, the other against the person and against the other property of the defendant. As to the mortgaged property there is now no question. Their Lordships are of opinion that the Law of Limitation, which says a bond for money must be enforced within a certain date, applies to the specific demand here for a personal remedy against the defendant. The plaintiff can have no personal remedy—his remedy against the person of mortgagor is barred, but his right remains to enforce his demand against the mortgaged property. As far as personal demands, including simple bonds, are concerned, the language of the Act is plain and clear. S. 4 of the Act of 1871 directs that every suit instituted after the period prescribed therefor in the second schedule shall be dismissed. The second schedule places simple money demands generally under the three years' limitation, and under No. 65 the same limitation applied to a single bond, and under the same limitation are placed bills of exchange, arrears of rent, and suits by mortgagors to recover surplus from mortgagee. The six years' limit embraces suits on foreign judgments and some compound registered securities. The 12 years' period is made applicable principally to suits in respect of immoveable property, though it also applies to judgments and recognizances in India. But the counsel for the ap-

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pellant relied upon the language of the 132nd article of the second schedule, "For money charged upon immoveable property, 12 years." His contention was that that period of 12 years applied to every remedy which the instrument carried with it, and gave 12 years for the personal remedy against the mortgagor as well as against the mortgaged property.

Looking at the previous language with reference to personal suits, and at the language of art. 132, their Lordships think great inconveniences and inconsistencies would arise if they did not read the latter as having reference only to suits for money charged on immoveable property to raise it out of that property. That seems to their Lordships what the Legislature intended, and they are therefore of opinion that the decision of the High Court was right.

That being so, their Lordships will humbly advise Her Majesty to affirm the decree appealed from. There being no appearance for the respondent here, there will be no costs.

Their Lordships desire to add that their opinion on this appeal also applies to the separate appeal on the mortgage-bond of the 10th June, 1871.

Decree affirmed.

Solicitor for the appellant:—Mr. *T. L. Wilson.*

P. C. *
1884
December 12.

RAM DAYAL (PLAINTIFF) *v.* MAHTAB SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court for the North-Western Provinces.]

Irregularity in warrant of attachment preceding execution-sale—Act VIII of 1859, *s.* 222.

An execution-sale of the right, title, and interest in land was set aside by the Court, on the ground that the warrant for the execution of the decree and order of attachment of the property sold had not been signed by the Judge, but by the Munsarim of the Court; and at a second sale the property was sold to other purchasers, who, as well as the judgment-debtor, were sued by the purchaser at the first sale for a declaration of his right to have the first sale confirmed.

The High Court having held that, with reference to s. 222 of Act VIII of 1859, the first sale had been rightly set aside, an appeal to the Judicial Committee was dismissed with costs.

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* *Present:*—Lord FITZGERALD, Sir B. PEACOCK, Sir R. P. COLLIER, Sir R. COUCH, and Sir A. HOBHOUSE.

APPEAL from a decree (27th April, 1881) of the High Court (1) affirming a decree (30th June, 1879) of the Subordinate Judge of Aligarh, whereby the appellant's suit was dismissed. The object of this suit was to have effect given to a purchase made by the appellant, on the 21st August, 1876, of a portion of villages Raipur and Manipur, in the Aligarh district, at a sale in execution of a decree obtained by a third party against the first respondent, Mahtab Singh. This involved the setting aside an order of the District Judge of Aligarh (20th April, 1877), allowing an objection of the judgment-debtor to the confirmation of the sale.

On the 14th September, 1876, Mahtab applied to the Subordinate Judge, in whose Court the execution had taken place, for cancellation of the sale. The District Judge, to whom the application was transferred for hearing, gave judgment upon it on the 20th April, 1877, setting aside the sale, and permitting application to be made for another sale of the property. His judgment was the following:—

"The first contention on the applicant's part is, that no sale, properly so called, took place, that is, that all proceedings were vitiated *ab initio* by the irregularity of the warrant of execution, which ought not only to bear the seal of the Court, but also 'shall be signed by the Judge.' On examination, I find that the document in question was signed by the Munsarim and not by the Judge: an exactly similar irregularity in a notice of foreclosure, was held by the High Court in the case* marginally noted, to vitiate all subsequent proceedings in the case. In the face of such a clear ruling, I do not see that it is possible to reject the application to set aside the sale. The application is, therefore, admitted, and the sale is set aside, with permission to the decree-holder to move for a new sale. Each party to bear his own costs."

* Seth Har Lal *versus* Manik Pat and others, July 13th, 1873, No. 69.

At another sale, held on the 27th June, 1877, certain of the respondents purchased the property in dispute as being that of Mahtab Singh, judgment-debtor; and, thereupon, on the 15th April, 1878, the appellant sued both Mahtab Singh and the purchasers at the second sale, to obtain a declaration of his right to have the sale

(1) I. L. R., 3 All. 701.

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to him confirmed, notwithstanding the order of the 20th April, 1877.

The Subordinate Judge dismissed the suit, holding that the Judge in making the order of 20th April, 1877, was acting in accordance with the provisions of s. 256 of Act VIII of 1859. The dismissal of the suit was held to be correct by the High Court (OLDFIELD and STRAIGHT, JJ.), who dismissed an appeal, for the reasons appearing in their judgments which were the following: OLDFIELD, J., said—

"The decision of the majority of this Court in *Diwan Singh* v. *Bharat Singh* (1) has been pressed upon us as an authority for holding that the present suit is not barred by the terms of s. 257, Act VIII. of 1859. I myself dissented from the view taken by the majority of the Court in that case, but I feel myself bound to accept the ruling so far as it is applicable to the case before us. Assuming, however, that it is an authority for holding that the present suit is maintainable, and we are at liberty to determine if the Judge's order setting aside the sale was properly made or not, and if not, to set it aside and declare plaintiffs' right to have the sale confirmed to him, I am not disposed to do so, with reference to some of the grounds on which the Subordinate Judge proceeds.

The fact that the order of attachment and notices of sale were not issued under the signature of the Judge, but of the Munsarim, as though emanating from him, constituted serious illegalities of procedure: orders so issued could, properly speaking, have no legal effect, since s. 222, Act VIII of 1859 requires that the warrants for execution shall be signed by the Judge, and the Munsarim had no power to sign them, having regard to his duties as declared in s. 24, Act III of 1873 (Civil Courts Act), and the orders of this Court made in pursuance of the provisions of s. 24.—(C. O. No. 9, 1867, No. 11, 19th August, 1870.)

Moreover the sale could not now be confirmed in plaintiff's favour without serious injustice to the respondents who have purchased the property from Mahtab Singh *bonâ fide* and for value, and to whom at the time of the sale Mahtab Singh was able to

(1) I. L. R., 3 All. 205.

confer a good title, since the sale at which plaintiff bid could not become absolute without confirmation.

Since the date of the auction-sale also the liabilities on the property have been satisfied, and the state of things has materially changed, and it would be inequitable to allow plaintiff, after standing by for a year and permitting dealings to be made with the property, to come in and take advantage of the change of circumstances, and obtain a property become much more valuable at the price he originally offered.

I refuse, therefore, to give a declaration of his right to have the sale confirmed to him, and I would dismiss the appeal with costs."

STRAIGHT, J., said :—" I concur with my honourable colleague, that the plaintiff's claim should be disallowed and this appeal dismissed. I am of opinion that the sale in execution at which the plaintiff bought was wholly void, and that the absence of the signature of the Judge from the warrant and attachment vitiated the proceedings in execution *ab initio*. The language of s. 222 of Act VIII of 1859 is plain and positive, and it seems to me impossible to hold that the order directing attachment is not a warrant within the meaning of that section, whether it was directed to the nazir or other person to seize the moveable property of a judgment-debtor, or to the judgment-debtor himself, prohibiting him from alienating his immoveable property : it was an order essentially in the nature of a warrant, and as such required the Judge's signature under the old law. It was contended for the appellant at the hearing that this objection was not taken by the judgment debtor in the grounds upon which he asked for cancelment of the sale, and that the Judge had no right to entertain it of his own motion. I am by no means sure that this plea has any foundation in fact ; for I find that the Judge remarks in his judgment that the first contention on the appellant's part is, ' that no sale, properly so called, took place, that is, that all proceedings were vitiated *ab initio* by the irregularity of the warrant of execution, which ought not only to bear the seal of the Court, but also 'shall be signed by the Judge.' "

" Even if this point had not been started by the judgment-debtor, I think it would have been competent for the Judge himself

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to take notice of it, going as it does to the very root of the proceedings; but, under any circumstances, we, in a suit like the present, which practically invites us to confirm a sale by declaring the plaintiff's right to have it confirmed, are in my opinion not only entitled, but bound to closely scrutinise all the proceedings in execution, to ascertain whether such sale was a valid and binding one. This I have already said it was not, and the foundation of the plaintiff's claim therefore falls away. I say nothing as to his conduct in holding back until almost the very last moment from instituting his suit, though I am glad to think that, from the point of view from which I regard the case, the subsequent innocent purchasers from the judgment-debtor will retain the property they have not only bought and paid for, but the incumbrances upon which they have discharged."

The plaintiff appealed to Her Majesty in Council.

For the appellant, Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne.*

For the respondent, Mr. *H. Cowell.*

The case for the appellant having been opened, and argument heard to the effect, generally, that the irregularity must be dealt with as waived by an application for the postponement of the first sale made by the judgment-debtor, and that other matters had rendered it immaterial, Sir B. PEACOCK, referred to s. 222 of Act VIII of 1859.

Their Lordships concurred in an intimation that the judgment of the High Court was correct, and the appeal proceeded no further.

Appeal dismissed with costs.

Solicitors for the appellant: Messrs. *Ford, Ranken Ford & Ford.*

Solicitor for the respondents: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

1885
December 22.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

DURGA AND ANOTHER (DEFENDANTS) *v.* JHINGURI AND OTHERS (PLAINTIFFS)*

Act XVIII of 1873 *(N.-W. P. Rent Act), s.* 9—*Sale of occupancy-rights with zamindar's consent—Acceptance of rent by zamindar from vendees—Act IX of* 1872 *(Contract Act), ss* 2, 23—*Estoppel—Act I of* 1872 *(Evidence Act), ss.* 115, 116.

Under a deed dated in 1879 the occupancy-tenants of land in a village sold their occupancy-rights, and the zamindars instituted a suit for a declaration that the sale-deed was invalid under s 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants.

Held by OLDFIELD, J., that sales of occupancy-rights were not void under s. 9 of Act XVIII of 1873, when made with the consent of the landlord, that the sale which the zamindars had consented to was valid, and that, under any circumstances, they were estopped by their conduct from bringing a suit to set aside the sale. *Umrao Begam* v. *The Land Mortgage Bank of India* (1) referred to.

Per MAHMOOD, J.—That the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873. *Umrao Begam v. The Land Mortgage Bank of India* (1) distinguished.

Also *per* MAHMOOD, J.—That s. 115 of the Evidence Act implies that no declaration, act or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendee was misled by the fact that the zamindars were consenting parties to the sale-deed; that he could not plead ignorance that the deed was unlawful and void; that it had not been shown that he acted upon the zamindars' agreement to take no action, so as to alter his position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid.

Also *per* MAHMOOD, J.—That the zamindars having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court

UNDER a deed dated the 5th July, 1879, Gopal and Jai Ram, the occupancy-tenants of certain land in a village called Shikaripur, sold their rights in the land to Durga and Mahadeo the de-

* Second Appeal No. 1741 of 1883, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 15th August, 1883, reversing a decree of Shah Ahmad Ullah, Munsif of Benares, dated the 22nd March, 1883.

(1) I. L. R., 1 All. 547.

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fendants in this suit, for Rs. 700. The present suit was brought by the zamindars of the village, in July 1883, for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873, (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land.

The Court of first instance (Munsif of Benares) dismissed the suit, on the ground that the plaintiffs had consented to the sale, and had recognized the vendees as tenants by accepting rent from them, and that Act XVIII of 1873 did not prohibit a sale of occupancy-rights made with the consent of the landlord. On appeal by the plaintiffs the District Judge of Benares reversed the Munsif's decision, and decreed the claim. He did not, however, record any definite finding as to whether or not the plaintiffs had consented to or acquiesced in the sale. The defendants appealed to the High Court.

The Court (OLDFIELD and MAHMOOD, JJ.) remitted the following issues for trial by the lower appellate Court :—

"Whether the plaintiffs gave their consent, expressly or impliedly, to the alienation.

"Whether they have recognized the defendants as tenants."

Upon both these issues the lower appellate Court returned findings in the affirmative.

On the case coming again before the Court,

Lala *Lalta Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), and Munshi *Hanuman Prasad*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgments :—

MAHMOOD, J.—I regret to say that in this case my brother Oldfield and I are unable to agree upon the questions of law involved. The zamindars contend that the sale-deed of the 5th July, 1879, was void *ab initio*, and that in consequence of its being void the present defendants possess no rights as occupancy-tenants. The prayer in the plaint is for possession of the land in dispute, and for the ejectment therefrom of the defendants as trespassers. The main question in the case is that raised by the

second plea in appeal :—" As the plaintiffs were consenting parties to the sale, and realized rent from the appellants, they cannot now sue to set aside the sale."

In dealing with this question, we must first read the second paragraph of s. 9 of the Rent Act (XVIII of 1873), the effect of which was considered by a Divisional Bench of this Court in *Umrao Begam* v. *The Land Mortgage Bank of India* (1), and again by a Full Bench in the same case (2), but the question did not arise in that case in precisely the same shape as now. The ruling of the Court was, that s. 9 did not prevent a landholder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. The judgment did not relate to a private transfer, but to the question whether or not the zamindar could sell the property through the Court. Spankie, J., was of opinion that, even in the execution of a decree, the zamindar's consent could not make valid a transfer prohibited by s. 9. He held—and I agree with him—that no order of the Court could make valid a transaction which the parties themselves could not privately effect; for what can be sold in execution of a decree is only the rights and interests of the judgment-debtor. That case, however, is distinguishable from the present, and although the judgment may contain *dicta* which seem to apply here, nothing in it is binding on us which was not essential to the point actually determined. There is here no question as to the execution of a decree, but only as to the validity of a private transfer. The question is, whether or not the sale-deed of the 5th July, 1879, is contrary to law, and therefore void. I may here refer to s. 2 of the Contract Act, and in particular to clause *g*) of that section :—" An agreement not enforceable by law is said to be void," and clause (*h*)—" An agreement enforceable by law is a contract." " Contract," therefore, means a valid agreement *enforceable* by law. Clause (*d*) of the same section defines " consideration," and s. 23 specifies what considerations are lawful and what are not :—" The consideration or object of an agreement is lawful unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or

(1) I. L. R., 1 All. 547. (2) I. L. R., 2 All. 451.

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implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." Lastly, s. 24 provides that "if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void."

Now, the sale-deed of the 5th July, 1879, was undoubtedly a contract entered into at a time when Act XVIII of 1873 was in force. There can be no doubt that its object was such as to bring it within the terms of s. 23 of the Contract Act, which makes the consideration of an agreement unlawful when it is of such a nature that, if permitted, it would defeat the provisions of the law. In the Full Bench case of *Gopal Pandey* v. *Parsotam Das* (1) I explained my own conception of the rights of an occupancy-tenant in these Provinces, and I expressed the opinion that this prohibition of transfer contained in s. 9 of the Rent Act was designed by the Legislature to prevent the rights of agriculturists from being shifted, and was intended for the benefit, not only of the zamindars, but also of the tenants referred to in the section. If this sale-deed is held to be valid, then the transfer will take place, and will enable the defendants to claim all the rights which the occupancy-tenants possessed.

The second point before us relates to estoppel. It is said that whatever may be the object of the contract contained in the deed, and however illegal it may be, the zamindars consented to it, and cannot now maintain that it is void. The fundamental principle of estoppel is given effect to by s. 115 of the Evidence Act in the following terms:—"When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such a belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." This implies that no declaration, act, or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position; and to do this he must

(1) I. L. R., 5 All, 121.

both believe in the facts stated or suggested by it, and must act upon such belief. The altering of his position by the person pleading estoppel is an essential part of the rule. In this case at most it can be said that the zamindars were consenting parties to the execution of the sale-deed. But how was the vendee misled by this? He cannot plead ignorance that the deed was unlawful and void, because ignorance of law cannot be accepted as a plea in any case. But it is said that the plaintiff is estopped because he agreed to take no action. Here also I think it has not been shown that the vendee acted upon such an agreement so as to alter his position with reference to the land. Payment of rent may of course be evidence of tenancy, and tenancy once established would estop the *tenant* from disputing the landlord's title. The rule is codified in s. 116 of the Evidence Act; but I am unaware of any rule of law by which the *landlord*, under the circumstances of this case, would be estopped by reason of having received rent from saying that the tenant has derived his title under a conveyance opposed to the express terms of the law. What then should be our decree in this case? The first Court dismissed the claim, the lower appellate Court has decreed it *in toto*. My judgment, however, is only in part in the plaintiffs' favour, namely, that they are competent to maintain that the sale-deed is void and gives no occupancy-rights to the vendee But the finding of the lower appellate Court upon the second issue is, that the plaintiff accepted the defendants as tenants, and took rent from them. Now, the taking of rent under such circumstances constitutes a tenancy under the Rent Law, and therefore the plaintiff is wrong in saying that the defendants are trespassers; and hence the question as to ejectment does not fall within the jurisdiction of the Civil Court. My own conclusion is, therefore, that the decree of the lower appellate Court should be upheld so far as it declares the sale-deed to be void, and that the suit should be dismissed so far as the claim for ejectment is concerned, leaving the plaintiff to his proper remedy in the Revenue Court.

OLDFIELD, J.—I would accept the findings of the Judge to the effect that the plaintiffs consented to the sale in favour of the appellants, and received arrears of rent due on the holding by the vendors from them, and recognized them as tenants.

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The sale was made at the time Act XVIII of 1873 was in force, and sales of rights of occupancy were not void under s. 9 when made with the consent of the landlord. This principle was affirmed by the Full Bench of this Court in the case of *Umrao Begam* v. *The Land Mortgage Bank of India* (1), and the sale the plaintiffs have consented to will be valid, but under any circumstances they are estopped by their conduct from bringing this suit to set aside the sale.

I would reverse the decree of the lower appellate Court, and restore that of the first Court dismissing the suit with all costs.

1884 December 23.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

BHAIRO AND OTHERS (PLAINTIFFS) v. PARMESHRI DAYAL AND OTHERS (DEFENDANTS).*

Transfer of property—Condition restraining alienation—Inheritance—Act IV of 1882 (*Transfer of Property Act*), *ss.* 2, 10—*Act VI of* 1871 (*Bengal Civil Courts Act*), *s.* 24.

In a suit for possession of certain shares in certain villages, a compromise was effected between the plaintiffs and *B* the defendant The terms of the compromise were embodied in a deed, the terms of which were (*inter alia*) as follows:—"The said *B* will hold possession as a proprietor, generation by generation, without the power of transferring in any shape ...The following shares recorded in *B's* name shall not be transferred or sold in auction in payment of any debt payable by the said *B*, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession." *B* obtained possession of the shares allotted to him by the compromise. Subsequently, certain creditors of *B* attached the shares referred to in the deed in execution of a decree obtained against the heirs of *B* for money lent to *B* on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment.

Held by OLDFIELD, J., that the deed of compromise passed an absolute estate to *B* and his heirs to which the law annexed a power of transfer, and that, in reference to s. 10 of the Transfer of Property Act, the stipulation against alienation on *B's* part, or against sale by auction in execution of decrees against him, was void.

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* Second Appeal No 1609 of 1883, from a decree of R J Leeds, Esq, District Judge of Gorakhpur, dated the 12th May, 1883, affirming a decree of Hakim Shah Rahat Ali, Subordinate Judge of Gorakhpur, dated the 23rd March, 1882.

(1) I. L. R., 1 All, 547.

Per MAHMOOD, J.—That the rule contained in s. 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession or inheritance, to be governed by s 24 of the Bengal Civil Courts Act; that it was for those objecting to the attachment to show that, under the Hindu Law, the rights of *B* in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that, the Hindu Law being silent on this subject, the principles of justice, equity and good conscience must be applied, to which, so far as transfer was concerned, effect was given by s. 10 of the Transfer of Property Act; that the restrictions imposed by the deed of compromise upon *B's* powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognized; and that *B* must be held to have had an absolute estate which would devolve upon his heirs, and which could be sold in execution of decrees for his debts.

The *Tagore Case* (1) referred to.

THE defendants in this suit represented one Sahib Dayal and certain other persons, who, in 1863, brought a suit for possession of certain shares in certain villages against a lady named Raghubans Kuari and Bishan Lal, who was the manager of her estate. On the 7th October, 1863, the parties to that suit executed a deed of compromise, of which the part material to the purposes of this report was as follows:—"In the suit instituted by Sahib Dayal Singh and others, plaintiffs, against Raghubans Kuari and Bishan Lal, defendants, pending in this Court, to obtain possession of the shares in mauza Ahrauli, &c., situate in pargana Dhuriapur, the plaintiffs have actually the proprietary and hereditary rights in the shares in dispute; and we have settled the matter as follows." [The deed then proceeded to direct a division of the property among the parties in certain proportions, and continued thus :—] "That the said Bishan Lal shall hold possession over the undermentioned shares as a proprietor, generation by generation, without the power of transferring in any shape, such as mortgaging the property by taking an advance, and he is bound to pay the Government revenue; but in the case of his doing any act against the said conditions, it will be invalid, and the other sharers will have no concern with the shares so allotted to the said defendant Bishan Lal; and according to the division the names are to be recorded in the *khewat*, and the right of the shares so vested shall not fall to the plaintiffs or any other than the male heirs of the said Bishan Lal. The following shares recorded in Bishan Lal's

(1) 9 B. L. R. 377.

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name shall not be transferred or sold in auction in payment of any debt payable by the said Bishan Lal; and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession."

Upon this compromise, the Court passed a decree in favour of the plaintiffs to that suit for the shares allotted to them by the compromise, and dismissed the rest of their claim. Bishan Lal obtained possession of the shares allotted to him by the compromise, and while in possession of them he, on the 27th February, 1865, gave a bond to the plaintiffs in the present suit, in which he made a simple mortgage of the shares This bond was for more than Rs. 100 and was not registered. The obligees of the bond brought a suit against the heirs of Bishan Lal on the bond, and obtained a decree. In execution of this decree the shares allotted to Bishan Lal by the compromise were attached. The defendants in the present suit, as the representatives of the plaintiffs in the suit in which the compromise was made, objected to the attachment. Their objection was allowed, and in consequence the present suit was brought by the plaintiffs to establish that the shares were the property of Bishan Lal and liable for his debts. The main question raised by the suit was as to the interest which Bishan Lal took under the compromise in the shares, and whether the shares were liable for his debts. Both the lower Courts dismissed the suit. The lower appellate Court held that the compromise, transferred to Bishan Lal a life-interest in the shares only, and that as such an interest was not alienable, the condition in the compromise as to forfeiture on breach of the covenant against alienation was a perfectly valid one. The Court therefore held that the shares were not liable for the debt of the plaintiff.

In second appeal, the plaintiffs contended that the lower appellate Court had placed a wrong construction on the compromise, and that document conveyed to Bishan Lal an absolute proprietary interest in the shares allotted to him, and those shares were liable to be sold in execution of the decree of the plaintiffs as the property of Bishan Lal.

Mr. *T. Conlan* and Munshi *Sukh Ram*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondents.

OLDFIELD, J.—The plaintiff obtained a decree for money lent to one Bishan Lal on a bond. The decree was against the heirs of Bishan Lal. He sought to bring to sale in satisfaction of it the property in suit, and the respondents objected to the sale, and the objection was allowed. The object of this suit is to have it declared that the property was the property of Bishan Lal, and liable to be sold in satisfaction of his debt.

It appears that this property and other property was the subject of litigation some years ago between Bishan Lal and the respondents, and they came to a compromise by which this property was transferred to Bishan Lal. The respondents, however, allege that the terms of the arrangement placed restrictions on Bishan Lal's power of transfer. I have examined the copy of the deed of compromise filed on which the respondents reply, and I find that it passes an absolute estate to Bishan Lal and his heirs. The terms are :—" The said Bishan Lal will hold possession as proprietor, generation by generation, (*naslan bád naslan*)." These words show that he obtained an estate heritable according to law, to which the law annexes a power of transfer, and the stipulation against alienation on his part, or against sale by auction in execution of decrees against Bishan Lal, must be held void. I may refer to *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1) and the *Tagore Case* (2), and s. 10, Transfer of Property Act. The decree of the lower appellate Court is set aside, and the case remanded for disposal on the merits.

MAHMOOD, J.—The question raised by the facts of the present case is whether the property in suit is or is not liable to sale in execution of the decree obtained by the plaintiffs against the heirs of Bishan Lal for debts due by him.

In the first place, we have to consider in what way the interest of Bishan Lal in the property was created. To answer this question it is necessary to refer to the deed of compromise which ended the litigation of 1863. This deed is a fact of the greatest

(1) I. L. R., 5 Calc. 438. (2) 9 B. L. R. 377.

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importance in the case. It begins with the words:—"In the suit instituted by Sahib Dayal Singh and others, plaintiffs, against Musammat Raghubans Kuari and Bishan Lal, defendants, pending in the Court, to obtain possession of the shares in mauza Ahrauli .....the plaintiffs have actually the proprietary and hereditary rights in the shares in dispute, and have settled the matter as follows." That is, the first sentence in the deed admits, on behalf of all the parties to the suit, that the plaintiffs are full proprietors of the disputed property, but have entered into an agreement in the form of a *sulah-noma* as follows. The deed goes on to provide the manner in which the property is to be divided among the parties, and the last portion of it says that certain properties are, with the consent of the plaintiffs, to be allotted to Bishan Lal. But then comes the most important clause in the *sulehnama*:—"That the said Bishan Lal hold possession over the under-mentioned shares as a proprietor, generation by generation, without the power of transferring in any shape, such as mortgaging the property by taking an advance sum, and he is bound to pay the Government revenue; but in the case of his doing anything against the said terms, it will be invalid, and the other sharers will have no concern with the shares so allotted to the defendant Bishan Lal, and according to this decision the names are to be recorded in the *khewat*, and the right of the shares so invested would not fall to the plaintiff or any other than the male heir of the said Bishan Lal. The following shares recorded in Bishan Lal's name shall not be transferred or sold in auction in payment of any debt payable by the said Bishan Lal, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside such transfer and to obtain possession." Now, this deed of compromise was presented to the Court with an application for a decree in accordance with its terms. But the Court to which the application was made passed the following decree:—"According to the compromise, out of the property a four-pies share in each of the mauzas" (names of mauzas set out) "and a two-pies share in" (name of mauza set out) "and a two-annas and eight-pies share in each of the mauzas" (names of mauzas set out) "be decreed in favour of the plaintiffs, and the rest of the claim be dismissed.

As the parties have not written anything about costs they shall bear the costs in proportion to the claim decreed and dismissed." In other words, the suit of the plaintiffs in 1863 was decreed to the extent of the claim less the property given by the compromise to Bishan Lal. Then the decree went on to say :—"Such passages in the compromise as are unnecessary and irrelevant in this case may be regarded as void and unnecessary; and having regard to the fact that the said passages are irrelevant to the present case, they have not been attested by the parties, and they are at liberty to be bound by the said passages or not; the Court has nothing to do with them."

Now this point occurred to me during the argument. This compromise was simply a petition to the Court for a decree according to its terms. The decretal order was one declining to grant the petition, and declaring the compromise ineffectual so far as concerned the estate conferred by it on Bishan Lal. I am inclined to think that this circumstance might be sufficient to justify the plaintiffs' claim. But I do not wish to base my judgment on that ground. Even if the compromise simply represented the terms of a previous oral agreement, I should still hold that the present appeal must prevail. Giving the greatest benefit to the position of the defendants-respondents, we have to consider whether this is a question of succession or inheritance within the meaning of s. 24 of the Bengal Civil Courts Act (VI of 1871). I think that it is, because the question is, on the death of Bishan Lal, what estate devolved on the present respondents. The law which governs such a question as this is contained in s. 24 of the Bengal Civil Courts Act. I think that it was for the respondents to show that, under the Hindu Law of succession and inheritance, the rights of Bishan Lal in the property in dispute ceased to exist at his death, or that his estate devolved upon them free of liabilities for his debts.

No authority was cited in support of this opinion, and therefore, this being a question of succession, and the Hindu Law being silent on the subject, we must decide in accordance with the principles of justice, equity, and good conscience referred to in s. 24 of the Bengal Civil Courts Act. In order to ascertain what is the rule of justice, equity, and good conscience in the pre-

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sent case, the principles of jurisprudence are the best guide that we can have. These principles, so far as transfer is concerned, have received effect in the Transfer of Property Act, to which therefore it may be useful to refer. My brother Oldfield has called attention to s. 10 of that Act. It is a section which forms part of Chapter II—"Of transfers of property by act of parties." Now s. 2 (*d*) provides that nothing in the Act shall be deemed to affect, "save as provided by s. 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction; and nothing in this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law." The rule contained in s. 10 is, therefore, not binding upon us in this case. Still I do not think that there is any rule of Hindu Law which is inconsistent with the object of the Legislature as expressed in s. 10. The leading cases on the subject are those which have been referred to by my brother Oldfield. The exact point decided in those cases does not arise here, but the *ratio decidendi* is applicable. In the first place, I have no doubt that the deed of compromise of the 7th October, 1863, begins by declaring Bishan Lal to have an estate which is heritable, going to his heirs "generation by generation," and in fact to be the proprietor. Then come restrictions of his right and of his heir's right to alienate the property The reason of the rule disallowing such restrictions, that is, the reason of s. 10 of the Transfer of Property Act, is best expressed in the judgment of the Privy Council in the *Tagore Case* (1). Their Lordships say:—"The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the be nefit of individuals, but for reasons of public policy—*Domat*, 2413. It follows directly from this that a private individual who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord

(1) 9 B. L. R. 377.

Justice Turner in *Soorjeemonty* v. *Denobundoo Mullick* (1). A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

There is also another passage in the same judgment which applies in principle to the question raise in this case :—" If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate, which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize."

These principles appear to me to be equally applicable to the circumstances of England and of India, and in the absence of any provision of Hindu Law by which their application is negatived, I think that the present case falls within their scope. The deed of compromise first gave an absolute estate to Bishan Lal, and then proceeded to impose restrictions upon his powers of alienation. These restrictions are opposed to the policy of the law, they cannot be recognised, and therefore Bishan Lal must be held to have had an absolute estate which would devolve upon his heirs and which could be sold in execution of decrees for his debts. I concur therefore in the order which my brother Oldfield has proposed.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885
January 14.

NAND RAM AND ANOTHER (PLANTIFFS) *v.* FAKIR CHAND (DEFENDANT).*

Arbitration—Remand under Civil Procedure Code, s. 566 *for trial of issues—Reference by first Court of whole case to arbitration—Refusal of arbitrator to act—Award by remaining arbitrators—Illegality of award—Civil Procedure Code, s.* 510.

A Court of first instance to which issues have been remitted under s. 566 of the Civil Procedure Code by the appellate Court has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference

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* Second Appeal No. 54 of 1884, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 12th March, 1883, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 27th January, 1882.

(1) 6 Moo. I. A. 555.

of the case to arbitration, which is only within the jurisdiction of the appellate Court. *Gossain Dowlut Geer* v. *Bissessur Geer* (1) referred to.

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When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award.

Where a case was referred by a Court to the arbitration of three persons, and the parties to the reference agreed to be bound as to the matters in dispute by the decision of a majority of the arbitrators, and one of the arbitrators subsequently refused to act, and withdrew from the arbitration,—*held* that the Court could not pass a decree on the award of the remaining arbitrators, and could only, under s 510 of the Civil Procedure Code, appoint a new arbitrator or supersede the arbitration and proceed with the suit. *Kazee Syud Naser Ali* v *Musammat Tinco Dossia* (2) and *Rohilkhand and Kumaon Bank* v *Row* (3) referred to.

THE plaintiffs in this case claimed the money due on a promissory note. The Court of first instance (Subordinate Judge of Meerut) dismissed the claim. The lower appellate Court remanded the case to the Subordinate Judge for the trial of certain issues under s. 566 of the Civil Procedure Code. At the end of the order of remand, the Court made the following observations:—"I should hope that this case may be settled out of Court. Otherwise this Court will proceed to judgment on the expiry of seven days after the return of the lower Court's finding on the above issues. After the case had gone back to the lower Court for the trial of the issues remitted, the parties on the 20th April, 1882, applied to the Subordinate Judge that the matters in dispute might be referred to arbitration, and accordingly an order of reference was passed on the same day. Each of the parties appointed an arbitrator, and an umpire was also appointed, and it was agreed that the parties should be bound as to the defendant's liability upon the promissory note by the decision of a majority of the arbitrators. On the 22nd May, 1882, the three arbitrators held their first meeting. On the 23rd, the arbitrator appointed by the plaintiffs, one Nainsukh, filed an application in Court stating that he withdrew from the arbitration, and refused to take any further part in it. The next meeting took place on the 27th May, 1882, Nainsukh being absent, and at that meeting the award was prepared and signed by the arbitrator appointed by the defendant and the umpire. Objections were made by the plaintiffs to the validity of the award, thus made,

(1) 22 W. R. 207. (2) 6 W. R 95.
(3) I. L. R. 6 All., 468.

but the Subordinate Judge overruled these objections, and sent up the award to the lower appellate Court, which passed a decree in accordance with its terms.

From this decision the plaintiffs now appealed to the High Court.

Mr. *C. H. Hill*, for the appellant.—The Court of first instance had no authority to refer the case to arbitration after issues had been remitted under s. 566. *Gossain Dowlut Geer* v. *Bissessur Geer* (1) is in point, and shows that the effect of remitting issues is not to remand the case for retrial, and that the first Court could not refer to arbitration so much of the matter as it had already dealt with. After the first Court had passed its decree it became *functus officio*, and when the appeal was preferred, the lower appellate Court was seized of the case, and continued to be so after it had remitted issues. The functions of the lower Court when issues were remitted to it were purely ministerial. They extended merely to the return of findings upon these issues. But a reference to arbitration is a delegation of power to decide the whole case, and such a delegation cannot be made were the Court itself has no such power. S. 508 of the Civil Procedure Code enacts that when once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as thereinafter provided. S. 522 provides that "if the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, and if no application has been made to set aside the award, or if the Court has proved such application, the Court shall.....proceed to give judgment according to the award." This clearly shows that what the Legislature contemplated was that no Court should have power to refer a case for arbitration, which could not make a decree according to the award. That could not have been done by a Court which was only authorized to return findings upon certain issues remitted to it by an appellate Court. My second point is that when one of the arbitrators refused to act, the other arbitrators had no authority to proceed to make an award in his absence and to which he was not a party, even though the parties had agreed to be bound by the decision of a majority. [He was stopped.]

(1) 22 W. R. 207.

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Babu *Baroda Prasad Ghose*, for the respondents.—The appellants themselves moved the Court of first instance to refer the case to arbitration. It does not lie in their mouths, therefore, to say now that the Court was not competent to make the reference. [MAHMOOD, J.—In India there can be no waiver of pleas to jurisdiction. The fact that the appellants applied for the reference to arbitration does not stop them from disputing the legality of the Court's action.] In reference to the second point raised by the other side, the Subordinate Judge found that the arbitrator, in refusing to proceed with the arbitration, acted in collusion with the plaintiffs, and in order to prevent an unfavourable award. [MAHMOOD, J. —That is a two edged argument, for it practically amounts to saying that one of the arbitrators acted corruptly, and that would be a good objection to the award]

Mr. *Hill*, for the appellant, was not called upon to reply.

OLDFIELD, J.—Both pleas are good. The Court of first instance had only jurisdiction to try the issues remitted to it by the appellate Court, and was *functus officio* in other respects, and could not make a reference to arbitration, which was only within the jurisdiction of the appellate Court - see *Gossain Dowlut Geer* v. *Bissessur Geer* (1). Further, it is clear that one of the arbitrators refused to act, and the only course open to the Court was, under s. 510, to appoint a new arbitrator, or supersede the arbitration, and proceed with the suit. The Court could not pass a decree on the award of the remaining arbitrators.

The decree of the lower Court is reversed, and the case remanded for trial. Costs to follow the result.

MAHMOOD, J.—I am of the same opinion. Two pleas in appeal have been raised in this case. The first is, that the order of reference, dated the 20th April, 1882, was illegal, and the second that the absence of one of the arbitrators vitiated the award, and that the decree carrying out the terms of the award was therefore wrong. I am of opinion that when a Court has disposed of a case and passed a decree upon it, the jurisdiction assigned to the Court ceases, so far as that case is concerned, and can be revived only in the manner and to the extent which the law prescribes. In the

(1) 22 W. R. 207.

present case, when the Subordinate Judge had passed his decree, he had no power to interfere with it except by review or in consequence of the direction of a superior Court. And as soon as the appeal was filed in the Court of the District Judge, that Judge only was competent to deal finally with the case. What I mean by "dealing finally" with it is the power to say yes or no to the plaintiff's claim. Now, an order passed by the District Judge under s 566 of the Civil Procedure Code has not for its object the transfer of the appellate Court's jurisdiction —its power to say yes or no to the claim—to the Court of first instance. It amounts to nothing more than a delegation to that Court of authority to take evidence upon certain issues which it is necessary to determine, and which may be dealt with either by the appellate Court under s. 568, or by the Court of first instance on remand under s. 566, at the discretion of the appellate Court.

The only tribunals which really have power to dispose of disputes are those which the State has established. Those tribunals can only delegate the powers conferred on them by the Legislature if, and in so far as, the Legislature expressly authorizes them to do so. It is obvious that if a Court has jurisdiction to deal with a particular suit, it may delegate that power, but it cannot delegate a case which it cannot itself try. I think that the principle of the maxim *delegatus delegari non potest* applies here, and that the Subordinate Judge being, in this sense, himself a delegate in the case from the District Judge, could not himself delegate it to another tribunal, that his order of reference was therefore *ultra vires*, and that everything done in consequence of it was invalid.

In regard to the second point I agree with my brother Oldfield that the presence of all the arbitrators at all meetings, and above all at the last meeting, when the final act of arbitration is done, is essential to the validity of the award. The learned pleader for the respondent has cited two decisions of the Calcutta High Court to the contrary effect. One of these is *Kazee Syud Naser Ali* v. *Musammat Tinoo Dossia* (1) in which it was held that the absence of one arbitrator out of three who have been appointed does not vitiate the award, if the parties agreed to be bound by the decision of a majo-

(1) 6 W. R., 95.

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rity. I confess that I am unable to agree in this view of the law. What the parties to a reference to arbitration intended is that the persons to whom the reference is made should meet and discuss together all the matters referred, and that the award should be the result of their united deliberations. This conference and deliberation in the presence of all the arbitrators is the very essence of the arbitration, and the sole reason why the award is made binding. In a case recently decided by this Court—*Rohilkhand and Kumaon Bank* v. *Row* (1), I took occasion to express my views upon a cognate subject, holding that no judgment can be given in a Court consisting of several Judges, unless those Judges have conferred together, heard evidence and arguments together, and formed their opinions upon the entire arguments and evidence so heard. I held that the only proper decree was that of the majority after such conference. Here the same principle should be applied. Whatever may have been the arbitrator's motive for withdrawing, his non-participation in the deliberations of the others makes their award *ultra vires* and of no effect.

I therefore concur with my brother Oldfield that the appeal should be decreed and the case remanded to the lower appellate Court under s. 562 of the Civil Procedure Code. Costs to follow the result.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1855 *January* 15.

MAHADEI (PLAINTIFF) v. RAM KISHEN DAS AND OTHERS (DEFENDANTS) *

Court-fees—Act VII of 1870 *(Court-Fees Act), ss.* 6, 12, 28—*Order requiring additional court-fee on claim, passed subsequent to decree—Decree prepared so as to give effect to subsequent order—Civil Procedure Code, ss.* 54, 55, 584.

A Judge, after disposing of an appeal on the 1st March, 1883, again took it up, and on the 21st March, 1883, directed the appellant to pay additional court-fees on her memorandum of appeal. On the 2nd May, 1883, the appellant paid the additional court-fees under protest, and a decree was then prepared, bearing date the 1st March, 1883, but it referred to and carried into effect the subsequent order of the 21st March and the 2nd May.

Per MAHMOOD, J., that as soon as the Judge had passed the decree of the 1st March, 1883, he ceased to have any power over it, and was not competent to

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* Second Appeal No 71 of 1884, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 1st March, 1883, affirming a decree of Hakim Shah Rahat Ali, Subordinate Judge of Gorakhpur, dated the 21st March, 1872.

(1) I. L. R., 6 All 468.

introduce new matters not dealt with by the judgment; that the order of the 21st March and the deposit of the 2nd May, whether right or wrong, were not proceedings to which effect could be given in the antecedent decree of the 1st March, 1883; and that the decree was *ultra vires* to that extent, and was therefore liable to correction in second appeal under s. 584 of the Civil Procedure Code.

The powers conferred by ss. 54 (*a*) and (*c*) and 55, read with s. 582 of the Civil Procedure Code, or by s. 12 of the Court-Fees Act (VII of 1870), read with clause (ii) of s. 10, are intended to be exercised before the disposal of the case, and not after it has been decided finally so far as the Court is concerned.

The powers conferred by s. 28 of the Court-Fees Act cannot be exercised by an order passed after the decision of the case to which the question of the payment of court-fees relates, and, even assuming that they can be so exercised, such an order, though it may be subject to such rules as to appeal or revision as the law may provide, cannot be given effect by making insertions in an antecedent decree.

Per OLDFIELD, J.—That the Court had power to make the order it did, inasmuch as the collection of court-fees was no part of a Judge's functions in the trial of a suit which could be said to have ceased with its determination; and the provisions of the Court-Fees Act fixed no time within which the presiding Judge could exercise his power of ordering documents to be stamped, and seemed, on the other hand, to contemplate the exercise of that power at any time subsequent to the receipt, filing or use of a document, and to make the validity of the document and the proceedings relative thereto dependent on the document being properly stamped.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Mahmood, J.

Mr. *T. Conlan* and Mr. *A. Reid*, for the appellant.

Mr. *C. H. Hill*, for the respondents.

MAHMOOD, J.—(After disposing of the first five grounds of appeal against the appellant, continued):—But on the sixth and last ground, I think that the appeal is good. It is necessary to bear in mind the following facts:—The appeal was heard by the District Judge, and finally dismissed by him on the 1st March, 1883. After he had thus disposed of it, he again took it up (it is not very apparent how), and on the 21st March, 1883, he directed the appellant to value the relief sought by her within a week from that date. The appellant, on the 31st March, filed an application, in which she objected to the case being re-opened in this manner by the District Judge, and maintained that the valuation which she, on behalf of her minor son, had made in the Court of first instance, and also in the District Judge's Court, was correct. Upon

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this application the District Judge, on the 3rd April, passed the following order:—"All the questions raised in this petition have been determined by my order of the 21st March, 1883, and the petitioner is required to value the relief sought in accordance with s. 7, cl. iv. of Act VII of 1870." The appellant, Musammat Mahadei, on the 7th April, made another application, in which she reiterated her objections to the re-opening of the case, and re-asserted the correctness of the valuation previously made by her, and at the same time, under protest, valued the relief sought by her at Rs. 2,000. On the 18th April, the District Judge passed an order peremptorily requiring the appellant to deposit within two weeks court-fees calculated on the valuation of Rs. 2,000. Then, on the 2nd May, 1883, the appellant filed a court-fee stamp of Rs 109-4, with an application, which was consigned to the records. A decree was then prepared, bearing date the 1st March, 1883, but it referred to and carried into effect the subsequent order of the 21st March and the deposit of the 2nd May, that is, the court-fee stamp which was calculated in accordance with the views of the District Judge as expressed in his order of the 21st March That decree has now come before us in second appeal, and it is impeached in the sixth ground of appeal in the following terms:—"That the lower Court was wrong in its estimation of the amount of court-fees payable by the appellant, and it erred in compelling the appellant to pay an additional sum on this account after the decision of the case."

We have therefore to consider the question whether, under s. 584 of the Civil Procedure Code, so much of the Judge's decree as goes beyond his judgment of the 1st March, 1883, ought to be set aside. I think that this question should be answered in the affirmative.

By s. 6 of the Court-Fees Act, it is provided that fees are to be levied on certain documents, and that no such document shall be receivable in Court without payment of the prescribed fee. If any difficulty should arise regarding the amount of fee to be paid on any document, s. 12 provides that "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of

appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit: but whenever any such suit comes before a Court of appeal, reference, or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of s. 10, paragraph ii, shall apply." Then s. 28 says:—"No document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped. But if any such document is, through mistake or inadvertence, received, filed, or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court may, if he thinks fit, order that such document be stamped as he may direct; and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance."

These are the only sections of the Court-Fees Act which appear to bear on the present matter. The question is:—Do they give jurisdiction to a Court to introduce into a decree matters lying outside its judgment, or to exercise any powers in connection with a decretal order after the Court passing it has become *functus officio* by having disposed of the case? I think that the proper answer is No. As soon as the Judge had passed the decree of the 1st March, 1883, he ceased to have any power over it, and was not competent to introduce new matters not dealt with by the judgment. The orders of the 21st March and the 18th April, and the deposit of the 2nd May, may very possibly have been correct so far as the calculation of the amount of court-fees is concerned; but upon that point I express no opinion, because according to my view they were not proceedings to which effect could be given in the antecedent decree of the 1st March, 1883. That decree seems to me, therefore, *ultra vires* to that extent. My reasons for this conclusion are that the learned District Judge could exercise such powers, either under the Civil Procedure Code, s. 54, clauses

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(*a*) and (*c*) and s. 55, read with s. 582, or under s. 12 of the Court-Fees Act which must be read with clause (*a*) of s 10, to which it expressly refers. Reading these provisions of the law, it seems to me clear that the powers thereby conferred are intended to be exercised *before* the disposal of the case, and not after it has been decided finally, so far as the Court is concerned. In the one case *rejection* and in the other *dismissal* are the penalties provided by the law if the deficiency in court-fees is not supplied in proper time, and it is obvious that neither of these powers can be exercised after the case has been decided and the Court has become *functus officio*.

But it is contended that s. 28 of the Court-Fees Act confers a power which the other sections to which I have referred do not, and that such power may be exercised at any time after the decision of the case without any limitation, because the matter of realizing court-fees is not a part of the trial or adjudication of the case, the result of which is incorporated in the decree. The point is not free from doubt, as the language of the statute is not sufficiently explicit; but even if the contention be accepted, it would go to show that that which is not the result of such trial or adjudication should not be included in the decree which can give effect only to such adjudication. That the decision as to payment of court-fees by parties to the litigation is an adjudication cannot, I think, be doubted, for in some cases it may be made the subject of appeal, as was held in *Chunia* v. *Ram Dial* (1) and again in *Gulzari Mal* v. *Jadaun Rai* (2). And when such adjudication takes place long after the case has been disposed of by the Court, I confess I am unable to see how effect can be given to it by inserting anything in a decree which represents only the result of an antecedent adjudication. I am, however, unable to accept the contention, because the Court-Fees Act does not separately provide any means for recovery of the additional court-fees, and the only penalties for failure to supply the deficiency are those to which I have already referred, and which consist in the powers of the Court exercisable only antecedently to the final decision of the case. Nor am I aware of any rule of law which would vitiate or annul a decree obtained by a party who, subse-

(1) I. L. R., 1 All. 360. (2) I. L. R., 2 All. 63.

quent to such decree, having been ordered to pay additional court-fees under s. 28 of the Act, fails to do so. The only interpretation, therefore, (so far as the present question is concerned), that I can put upon that section is, that the powers thereby conferred are to be exercised only before the final decision of the case to which the question of the payment of the court-fees relates, and that the provision as to the retrospective effect of the validity of such documents relates only to these documents which, being defectively stamped, have been wrongly received and used in the course of the trial of a case which has not yet been finally adjudicated upon. If I held otherwise, and decided that under s. 28 of the Court-Fees Act the Judge had power to make his decree of the 1st March different from what it would have been if the subsequent orders had not been passed, I should practically be deciding that, even after the dismissal of the appeal, the District Judge retained some kind of jurisdiction to be exercised *suo motu* in the case, and that he could at any time take up the oldest decree of his Court and modify it seriously as to costs in connection with the amount of court-fees.

But even if it be conceded that the powers conferred by s. 28 of the Court-Fees Act could be exercised by an order passed after the decision of the case, it seems to me that such an order must be regarded as a separate proceeding, to which effect could not be given by making insertions in an antecedent decree. The order may be subject to such rules as to appeal or revision as the law may or may not provide, but it could not, in my opinion, be dealt with in the decree, which represents only the result of a previous adjudication. It appears to me, therefore, that the course which the learned Judge adopted in this case amounted to exceeding his powers under the law, and that constitutes a substantial error which ought to be corrected by us in second appeal under s. 584 of the Civil Procedure Code. I would therefore modify the decree of the lower appellate Court so far as it gives effect to the order as to court-fees passed subsequent to the decree. But considering that the substantial part of the appeal has failed, I would make costs in all the Courts payable by the appellant.

OLDFIELD, J.—(After disposing of the first five grounds of appeal against the appellant continued) :—The last plea refers to

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the Judge's order directing the plaintiff to pay additional court-fees on his memorandum of appeal. It appears that it was after the decision of the appeal that the Judge passed his order, and it is contended he could not do so after decision. I am not prepared to say that the Judge had no jurisdiction to make such an order after decision of the suit, and it is only in respect of his order so far as it compelled the appellant to pay courts-fees that objection is made. The collection of court-fees is no part of a Judge's functions in the trial of a suit which can be said to have ceased with its determination.

These fees are levied under the provisions of the Court-Fees Act. S. 6 provides that no document in which a fee is chargeable shall be received in a Court of Justice unless the proper fee be paid in respect of it, and such fees are collected by stamps, and by s. 28 no document which ought to have a stamp under the Act shall be of any validity unless and until it is properly stamped, and if such document is through mistake or inadvertence received, filed, are used in any Court without being properly stamped, the presiding Judge may, if he thinks fit, order such document to be stamped as he may direct, and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

These sections fix no time within which the presiding Judge can exercise his power of ordering documents to be stamped, and seem, on the other hand, to contemplate the exercise of this power at any time subsequent to the receipt, filing or use of a document, and to make the validity of the document and the proceedings relative thereto dependent on the document being properly stamped.

I am of opinion, therefore, that the Court had the power to make the order it did, and we are precluded from entertaining an objection on the question of valuation of the memorandum of appeal, to which the other objection of the appellant relates, by the provisions of s. 12 (i) of the Act.

The appeal is dismissed with costs.

Appeal dismissed.

FULL BENCH.

1885
January 24.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

SHEO NARAIN (PLAINTIFF) *v.* HIRA (DEFENDANT)*

Pre-emption—Wajib-ul-arz—Purchase of share subsequent to sale—Purchaser's right of pre-emption.

Where there is a right of pre-emption under the *wajib-ul-arz*, which a shareholder could claim and enforce in respect of a sale of property, a person purchasing the said shareholder's interest in the village subsequently to the sale cannot claim and enforce pre-emption as his vendor might have done.

THE plaintiff in this case, subsequently to the 5th August, 1881, became a co-sharer in a village called Rasulpur, by purchase at a sale in execution of a decree of the share of a certain co-sharer in that village. He obtained a sale-certificate bearing date the 20th August, 1881. In the present suit he claimed to enforce the right of pre-emption, under the terms of the *wajib-ul-arz*, in respect of a sale by certain other co-sharers in the village of their share to the defendant Hira Panday, by a deed bearing date the 5th August, 1881. He alleged that this deed was really executed on the 26th November, 1881, the day on which it had been registered; and contended that, that being so, the transfer was made on the latter date. The defendant-vendee set up as a defence to the suit that the deed was executed on the 5th August, 1881, and the plaintiff was not entitled to claim pre-emption, not being at that date a co-sharer in the village. The Court of first instance found that the deed was executed on the 26th November, 1881, and gave the plaintiff a decree. On appeal by the defendant-vendee, the lower appellate Court found that the deed was executed on the 5th August, 1881, and dismissed the suit.

In second appeal the plaintiff contended that, assuming the deed was executed on the 5th August, 1881, he was nevertheless entitled to claim pre-emption, inasmuch as he had purchased all the rights and interests of the judgment-debtor whose share he had purchased, and, among them, the right of pre-emption.

* Second Appeal No. 281 of 1884, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 26th November, 1883, reversing a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 23rd February, 1883.

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SHEO NARAIN v. HIRA.

The Divisional Bench (OLDFIELD and BRODHURST, JJ.) hearing the appeal referred to the Full Bench the following question:—

"Where there is a right of pre-emption under the *wajib-ul-arz*, which a shareholder could claim and enforce in respect of a sale of property, can a person purchasing the said shareholder's interest in the village subsequently to the sale claim and enforce pre-emption just as his vendor might have done?"

Mr. *R. C. Saunders*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Kashi Prasad*, for the respondent.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—In my opinion, the question referred should be answered in the negative.

OLDFIELD, BRODHURST, and DUTHOIT, JJ., concurred.

MAHMOOD, J.—I have arrived at the same conclusion, but I am anxious to explain my reasons for taking this view. I take it as a fundamental principle of the right of pre-emption, that it is based on the inconvenience to co-sharers arising from the introduction of a stranger into the co-parcenary. I have on previous occasions explained that, in cases like the present, where, even though the right is not claimed under the Muhammadan Law, but under a custom recognized in the *wajib-ul-arz*, the rules of the Muhammadan Law must be applied by analogy, because equity follows the law, and the only system of the law of pre-emption to which we can look for equity to follow is the Muhammadan Law. Under that law, when the ownership of the pre-emptive tenement is transferred or devolves by act of parties, or by operation of law, the transfer or devolution passes pre-emption to the person in whose favour the transfer or devolution takes place; but the rule is essentially subject to the proviso that such person cannot enforce pre-emption in respect of any sale which took place before such transfer or devolution. This rule must also be applied to the present case. The reason why, although the right of pre-emption runs with the land, the plaintiff in this case cannot be allowed to enforce it, is that, to rule otherwise, would in effect be to allow a "stranger" to oust one who was not a "stranger" at the time of the sale. It is found in this

case that the sale respecting which pre-emption is claimed occurred on the 5th August, 1881. At that time the plaintiff was not a co-sharer, and his title did not come into existence till the 20th August, 1881. The reason why pre-emption in respect of the former sale does not go with the subsequent sale is that, while it may be that the plaintiff's vendor had no objection to the sale of 5th August, 1881, the plaintiff-purchaser may have objections.

Now, if at the time of the sale of the 5th August, the person who at that time owned the share purchased by the plaintiff had no objection to the sale, that sale gave rise to no cause of action, and nothing which happened afterwards could create one. In other words, a sale not open to any pre-emptive objection at the time it was made, cannot by a retrospective effect be subjected to objection on account of a subsequent event, namely, the sale of a share in the village to the plaintiff. To hold any other view would be to recognize absurdities which the law of pre-emption cannot possibly have contemplated. If the purchaser at the later sale (and this is the position of the plaintiff here) were to be allowed to pre-empt in respect of the previous sale, the consequence would be that, whilst the purchaser in the earlier sale could maintain a suit to enforce pre-emption in respect of the later sale, the purchaser at such later sale could maintain a pre-emptive suit in respect of the earlier sale. There would thus be two suits equally maintainable but wholly inconsistent with each other, for each plaintiff would call the other a "stranger," and the object of each suit would be to preclude the plaintiff in the other suit from the coparcenary. If both suits were dismissed, the state of things would remain exactly as it was before the suits were instituted: if both suits were decreed the result would simply be to introduce a kind of exchange—the one plaintiff taking the share purchased by the other plaintiff—a result which of course means that neither could exclude the other from the coparcenary. This would be a *re uctio ad absurdum* of the rule of pre-emption, for it would defeat the sole object of the right, namely, the exclusion of strangers. The only possible way to administer the rule of pre-emption would be to decide which of such two inconsistent suits was maintainable. And the answer is simple. The purchaser in the earlier sale was a co-sharer and not a stranger when the later sale took place,

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whilst the purchaser at such later sale was a stranger liable to be excluded from the coparcenary by the pre-emptive claim of any co-sharer for the time being. And it follows naturally that the suit of the purchaser in the earlier sale would be maintainable in respect of the later sale, and the later purchaser would have no right of pre-emption in respect of the earlier sale. To allow the later purchaser to maintain a pre-emptive suit in respect of the earlier sale would be to reverse the course which the rule of pre-emption contemplates.

For these reasons I am of opinion that the plaintiff in this case never had any right of pre-emption on the ground of the sale of 5th August, 1881, and my answer to the question referred is therefore in the negative.

APPELLATE CIVIL.

1885 *January* 29.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

HIRA DAI (DEFENDANT) *v.* HIRA LAL AND OTHERS (PLAINTIFFS)*

Ex parte decree—"Appearance" of defendant under Civil Procedure Code, s. 101—*Civil Procedure Code, ss.* 64, 100, 108, 157.

The first hearing of a suit was fixed for the 12th December, 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not then appear, a decree was passed in favour of the plaintiff. A *vakalat-nama* had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment.

Held that these acts on the defendant's part did not constitute an "appearance" by him within the meaning of s. 100 of the Civil Procedure Code, which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under s. 64; that the decree was therefore *ex-parte* within the meaning of ss. 100 and 108, and an appeal consequently lay to the High Court under s. 588, clause (9), from an order rejecting an application to set the decree aside. *Zain-ul abdin Khan* v. *Ahmad Raza Khan* (1) distinguished. *The Administrator-General of Bengal* v. *Dyaram Das* (2), *Bhimacharya* v. *Fakirappa* (3), and *Bibee Haloo* v. *Atwaro* (4) referred to.

Per MAHMOOD, J.—That the Court on the 18th December seemed to have acted under s. 157 of the Civil Procedure Code, and, choosing the first of the alterna-

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* First Appeal No. 69 of 1884, from an order of Maulvi Zain-ul-abdin, Subordinate Judge of Agra, dated the 14th April, 1884.

(1) I. L. R., 2 All. 67; L. R., 5 Ind. Ap., 233.
(2) 6 B. L. R., 683.
(3) 4 Bom. H. C. Rep. 206.
(4) 7 W. R., 81.

tive courses allowed by that section, acted under Chapter VII of the Code, and passed an *ex-parte* decree under the provisions of s. 100 of that Chapter.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Pandit *Nand Lal*, for the appellant.

Mr. *W. M. Colvin*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Munshi *Hanuman Prasad*, for the respondents.

OLDFIELD, J.—This is an appeal from an order refusing an application to set aside an *ex-parte* decree under s. 108 of the Civil Procedure Code. A preliminary objection has been made by the respondents' pleader, that although the Court below has dealt with the application under s. 108, there was in fact no *ex-parte* decree in the case within the meaning of ss. 100 and 108, as the defendant appeared in the suit, and in consequence there was no jurisdiction to entertain the application under s. 108, and the remedy for the appellant was by appeal from the decree.

It appears that the first hearing of the suit was fixed for December 12th, 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not appear, a decree was made in favour of the plaintiff. A *vakalat-nama*, however, had been filed on the defendant's part previously, and the plaintiff had filed an application for the attachment of the defendant's property before judgment, to which the defendant had objected, and it is contended that these acts on the defendant's part amount to an appearance, so that the decree cannot be considered an *ex-parte* decree, and the decision of the Privy Council in *Zain-ul-abdin Khan* v. *Ahmad Raza Khan* (1) is relied on.

That was a case decided under Act VIII of 1859, and all their Lordships decided was, that where the defendant had appeared on the day fixed for the first hearing, and had failed to appear at any date subsequent thereto to which the hearing of the suit may have been adjourned, he could not be held not to have appeared within the meaning of s. 111 of the Act, so as to make the hearing of the

(1) I. L. R, 2 All. 67; L. R, 5 Ind. Ap, 233.

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suit an *ex-parte* hearing, and the judgment an *ex-parte* judgment within the meaning of s. 119.

They had not before them nor did they decide the question now before us whether, where the defendant had not appeared at the first hearing or at any subsequent day to which the hearing had been postponed, but had taken some steps for other purposes, the proceedings would cease to be *ex-parte*. Indeed, their meaning seems to be otherwise, for they observe :—" Ss. 109—111 taken by themselves clearly relate to the appearance of parties and to their non-appearance at the first hearing of the suit." The latter section provides for disposal of the suit if the defendant does not appear, and placing on it the meaning placed by their Lordships, the inference is, that they meant to say that where the defendant does not appear at the first hearing, the proceedings will be taken *ex-parte*. Further on they observe :—" Looking at all the sections together, their Lordships are of opinion that the words 'who has not appeared,' as used in s. 111, mean who has not appeared at all, and do not apply to the case of a defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned." The words " who has not appeared at all," read with what immediately follows, and the other passage above quoted, seem to refer to appearance on the day fixed for hearing, or other day to which the hearing has been adjourned; that is, to a case where a defendant has not appeared at all on any day fixed for hearing, in answer to a summons to appear and answer the claim, and in that case the judgment will be *ex-parte*, although the defendant may have appeared for other purposes.

In *The Administrator-General of Bengal* v. *Dyaram Das* (1), where a defendant filed a written statement, and when the case was called on for final disposal, an application was made by counsel on his behalf for an adjournment, but the application was refused, and, no one appearing for him, the case was proceeded with and judgment obtained for the plaintiff, the decree was held to be *ex-parte*. It was pointed out that under Act VIII of 1859 there is no appearance other than that referred to in Schedule (*B*) of that Act, which is either for the first hearing of the suit

(1) 6 B. L. R, 688.

where the issues are to be fixed, or for the final disposal of the suit.

So in *Bhimacharya* v. *Fakirappa* (1) it was held that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant, but not instructed to answer or instructed not to answer at all, was an *ex-parte* hearing. And it has been held that merely filing a *vakalat-nama*, and when the case comes on not appearing in person or by pleader, is not an appearance—*Bibee Haloo* v. *Atwaro* (2).

The appearance referred to in s. 100 of the present Code is, in my opinion, appearance in answer to a summons to appear and answer the claim on a day therein specified, issued under s. 64 of the Code. S. 100 is part of Chapter VII—"On the appearance of the parties, and consequence of non-appearance," and refers, as is shown by s. 96 and other sections in this chapter, to their appearance or non-appearance on the day fixed in the summons for the defendant to appear and answer.

In this case, there has been no appearance of the defendant in answer to the summons to appear and answer the claim, and in consequence the hearing was *ex-parte* under s. 100, and the objection on this score fails.

On the merits of this appeal, I am of opinion that the appellant has made out a case for setting aside the *ex-parte* decree under s. 108. Her husband was the principal defendant, and the one who would have defended the suit; he died not long before the day fixed for the hearing; and the non-appearance of his widow is attributable to the position in which she was placed by his death, and her difficulty on a short notice to take the necessary steps to defend the suit.

The appeal is allowed, and the order of the lower Court and the decree are set aside. The case will be retried. Costs to follow the result.

MAHMOOD, J.—I concur in the order proposed by my brother Oldfield, and I only wish to add that there having been no appearance of the defendant-appellant on the 12th December, 1883, the case appears to have been adjourned by the Court *suo motu* to

(1) 4 Bom. H. C. Rep., 206. (2) 7 W. R., 81.

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the 18th December, and that at the next hearing the Court seems to have acted under s. 157 of the Civil Procedure Code, which allows two alternative courses, the first of which is proceeding to dispose of the suit under Chapter VII of the Code, and the second, making such other order as the Court thinks fit. I am of opinion that the Court chose the first of these alternatives, and acted under Chapter VII, and passed an *ex-parte* decree under the provisions of s. 100 of that chapter. My brother Oldfield has explained the ground upon which the decree should be considered as passed *ex-parte*, and the application being made under s. 108, an appeal lay to this Court under cl. (9), s. 588, from the order rejecting the application to set the decree aside.

Appeal allowed.

1885
February 19

Before Mr. Justice Mahmood.

LAKHMI CHAND (PLAINTIFF) *v.* GATTO BAI (DEFENDANT) *

Practice—Appeal—Security for costs—Civil Procedure Code, s 549—Application that appellant be required to give security—Order directing appellant to show cause—Absence of counsel to support application—Dismissal of application—Application to restore case to register—Civil Procedure Code, ss 98, 99, 647.

A petition was made under s. 549 of the Civil Procedure Code, praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, no one appeared to support it or to show cause against it, and it was accordingly rejected. An application was subsequently made on behalf of the petitioner praying that the case might be restored to the register, on the ground that counsel for the petitioner was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause, the petition should have been granted, and the absence of petitioner's counsel was immaterial.

Held that the matter was dealt with by s. 98 of the Civil Procedure Code, and that s. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made s. 99 the rule by which the Court was to be guided.

Held also that although no general rule could be laid down that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances, in the present case, taking the circumstances into consi-

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* First Appeal No. 134 of 1884, from a decree of Maulvi Muhammad Samiul-lah Khan, Subordinate Judge of Aligarh, dated the 27th June, 1884.

deration, an absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition to the register.

S. 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance, and an application should not be granted under that section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal, if it should be dismissed. *Maneckji Limji Mancherji* v. *Goolbai* (1) followed. *Ross* v. *Jaques* (2), *Seshayyangar* v. *Jainulavadin* (3), and *Jogendro Deb Roykut* v. *Funindro Deb Roykut* (4) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *G. E. A. Ross*, for the applicant (respondent in F. A. No. 134 of 1884).

Mr. *C. H. Hill*, for the opposite party (appellant in F. A. No. 134 of 1884).

MAHMOOD, J.—The facts of this case, so far as it is necessary to state them for the purpose of disposing of the present application, are the following:—On the 12th January, 1885, the respondent in F. A. No. 134 of 1884, an appeal pending before this Court, made an application under s. 549 of the Civil Procedure Code, praying that the appellant might be ordered to furnish security for the petitioner's costs both in this Court and in the Courts below. The application came before Duthoit, J., who so far granted it as to pass the following order:—"Let the office report the amount of the costs, and let notice issue to the other side." Upon this order, notices in Hindustani were issued by the office, which were examined by me, and which appeared to me to amount to notices directing the appellant to show cause why the prayer of the petitioner should not be granted. In the usual course of the business of this Court, the application came before me sitting in single Bench, on the 17th instant, and I passed the following order:—"No one appears to support the application, or to show cause against it. Rejected." This being the state of things, an application was made to me yesterday by Mr. Ross, who represents the respondent in the appeal, stating that the reason why neither he nor his colleague appeared when the case was called on, was as

(1) I. L. R., 3 Bom. 241.
(2) 8 M. & W. 13.
(3) I. L. R., 3 Mad. 66.
(4) 18 W. R. 102.

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stated in the petition. This application practically asks me to restore the case to the register. It was my intention before granting it to hear the other side, and to issue notice to the appellant to show cause why the prayer of the respondent should not be granted. But Mr. Hill, who represents the appellant, and who has received notice of the present application, has now appeared to show cause against it. I have heard counsel on both sides, and I should have felt myself bound to reject the application if I could have accepted the subtle argument of Mr. Hill, that there is no provision in the Civil Procedure Code under which an order granting it could be made. In my opinion, the Civil Procedure Code, which, in its first part treats of all matters arising in regular suits, deals with the present matter in s. 98. Here we have an applicant, an application, and a person representing the opposite party, and what happened was analogous to the case of a suit coming on for hearing, in which neither party appears, and in which the order of the Court is that the suit shall be dismissed without any order as to costs. Under these circumstances, I am of opinion that s. 647 of the Civil Procedure Code, which prescribes that the procedure laid down by the Code for suits shall be followed, as far as it can be made applicable, in proceedings other than suits, makes s. 99 the rule by which the Court is to be guided in the present matter. S. 99 provides that "whenever a suit is dismissed under s. 97 or s. 98, the plaintiff may (subject to the law of limitation) bring a fresh suit; or if, within the period of thirty days from the date of the order dismissing the suit, he satisfies the Court that there was a sufficient excuse for his not paying the court-fees required within the time allowed for the service of the summons, or for his non-appearance, as the case may be, the Court shall pass an order to set aside the dismissal, and appoint a day for proceeding with the suit." Here the allegations contained in the petition are not contradicted by Mr. Hill. They are to the following effect:—"That your petitioner applied for an order that the aforesaid appellant do furnish security for the costs of the respondent. That notice to show cause was issued and served on the appellant, and the said application was on for hearing to-day before Mr. Justice Mahmood. That your petitioner's counsel was in attendance at about quarter to 12 o'clock, the Court having

sat barely half an hour. That the said application was called on about half-past 11 o'clock and rejected on account of the absence of your petitioner's counsel, although no person for the appellant appeared to show cause. That your petitioner's counsel applied verbally, but the same was refused. That as no one on behalf of appellant appeared to show cause, the petition should have been granted, and the absence of your petitioner's counsel was quite immaterial."

Now, I am far from laying it down as a general rule that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a reguler suit, or an appeal, or a miscellaneous application. But in the present case, taking into consideration the fact that counsel on the other side was also absent, and that if Mr. Ross' view of the case is correct, my own order might possibly have been the reverse of what it now is, I hold that a difference of, say, fifteen minutes is not enough to preclude me from restoring the original application to the register. Each question of this kind must be dealt with, not according to any hard-and-fast general rule, but according to its own particular circumstances, especially as the practice of this Court is not yet settled as to the action which should be taken in case of the absence of counsel. My order will, therefore, be that my former order of the 17th instant be set aside, and that the original application be restored. I make no order as to costs of this proceeding because that matter will be more conveniently dealt with by the Judge disposing of the original application.

On the 20th February, the original application came on for hearing before MAHMOOD, J.

Mr. *G. E. A. Ross*, for the applicant (respondent).

Mr. *C. H. Hill*, for the opposite party (appellant).

MAHMOOD, J.—I do not think it necessary to ask Mr. Hill to reply, because in my opinion the application must be dismissed with costs. My reasons for this conclusion are that the only ground upon which the application has been made consists of a statement to the effect that the appellant was not pecuniarily in a position to pay the costs of the appeal in this Court, if the appeal should be dismissed. I have already recently expressed

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my reasons for thinking that s. 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance. At that time I was not aware of the rulings which Mr. Hill has cited to-day, but having now studied those rulings I consider that they go almost further in the same direction than I went on the occasion to which I have referred. One of these rulings is *Maneckji Limji Mancherji* v. *Goolbai* (1), in which Westropp C. J, laid down the rule that the mere poverty of an appellant is by itself no sufficient ground for requiring him to give security for the costs of the appeal. This case is, I think, on all fours with the present, and the decision seems to me the same in principle as that which was passed in *Ross* v. *Jaques* (2), although the point there apparently arose in a suit and not in appeal. Some authorities were also cited by Mr. Ross, the most recent being *Seshayyangar* v. *Jainulavadin* (3), in which the Madras High Court, consisting of the Chief Justice, Sir Charles Turner, and Mr. Justice Muttasami Aiyyar held that s. 549 of the Civil Procedure Code, though not necessarily inapplicable to pauper appeals, should not be applied to such appeals except on special grounds. This decision only supports Mr. Ross' contention to a partial extent, and it appears to me that the *ratio decidendi* favours the argument of Mr. Hill. Mr. Ross also cited an older case—*Jogendro Deb Roykut* v. *Funindro Deb Roykut* (4)—which again only supports him to a limited extent. The main point decided there was that "where the appellant was, according to his own statement, a pauper, and it appeared that others presumably able to furnish the necessary security were interested in the matter, the case was considered a proper one in which security should be given." I do not desire to express any opinion upon the rule here laid down, for although Mr. Ross touched on circumstances indicating that in the present case also "others presumably able to furnish the necessary security were interested in the matter," the application itself is silent on the point, and, as Mr. Hill has said, he is not called on to answer matters not appearing in the application. I dismiss the application with costs.

Application dismissed.

(1) I L R, 3 Bom. 241.
(2) 8 M. &. W. 13.
(3) I. L. R, 3 Mad. 66.
(4) 18 W. R. 102.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885
February 24.

RAM GHULAM AND OTHERS (DEFENDANTS) *v.* HAZARU KUAR AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, s. 244—Question for Court executing decree—Party to suit—Representative.

Where certain property was attached in execution of a decree passed upon a bond against the legal representatives of the obligor, and the judgment-debtors objected to the attachment on the ground that the property was not part of the obligor's estate and liable to be taken in execution of the decree, but was property which they could claim in their own right,—*held* that the matter in dispute was one between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree within the meaning of s. 244 of the Civil Procedure Code, and was therefore to be determined in the execution department and not by regular suit. *Chowdry Wahed Ali* v. *Musammat Jumaee* (1), *Shankar Dial* v. *Amir Haidar* (2), and *Nath Mal Das* v. *Tajammul Husain* (3) referred to.

Per MAHMOOD, J.—That the turning-point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor, in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property.

Kanai Lall Khan v. *Sashi Bhuson Biswas* (4) dissented from.

THE defendants in this suit, the obligees of a bond executed in their favour by one Imrit Kuar, after her death sued the plaintiffs in this suit, her daughters, on the bond, as representing their mother and being in possession of her estate. They obtained a decree, which directed that its amount should be realized by the sale of the property of Imrit Kuar, and exempting the persons and property of the plaintiffs from liability, and took out execution of it against certain property in the possession of the plaintiffs, alleging it to be the property of Imrit Kuar and liable under the decree. The plaintiffs objected to the attachment of the property, claiming it as their own, and their objections were disallowed. They thereupon instituted the present suit against the defendants to have it declared that the property did not form part of the estate of Imrit Kuar; that it formed part of the estate of their father;

* Second Appeal No. 334 of 1884, from a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 18th December, 1883, reversing a decree of Rai Kishen Lal, Munsif of Cawnpore, dated the 23rd December, 1882.

(1) 11 B. L. R., 155.
(2) I. L. R., 2 All. 752.
(3) *Supra*, p. 36.
(4) I. L. R., 6 Calc. 777.

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that Imrit Kuar's interest in it was only a life interest; that they had inherited it from their father; and that it was not liable to satisfy the decree against Imrit Kuar; and they sought to have the attachment removed.

The Court of first instance dismissed the suit, holding that the claim was one which should be determined under s. 244 of the Civil Procedure Code in the execution of the decree and not by a suit. On appeal by the plaintiffs the lower appellate Court held that the suit was maintainable, and gave the plaintiffs a decree. The defendants appealed to the High Court.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellants.

Pandit *Bishambar Nath* and Munshi *Hanuman Prasad*, for the respondents.

OLDFIELD, J.—The first plea taken in second appeal is that no suit will lie, with reference to the provisions of s. 244 of the Civil Procedure Code. The plea is valid. The matter in dispute is one between the parties to the suit in which the decree was passed, and relates to the execution, discharge or satisfaction of the decree. The decree was a decree against the estate of Imrit Kuar, and the question is substantially whether the property is part of that estate and liable to be taken in execution of the decree, or is property which the defendants can claim in their own right and something apart from Imrit Kuar's estate.

The decision of the Privy Council in *Chowdry Wahed Ali* v. *Musammat Jumaee* (1) is an authority for holding that a question of this nature is one to be determined in the execution of the decree. Their Lordships remark:—"It is obvious that a party in a representative character is so distinctly a party to the suit that under certain conditions his own private property may be attached and sold. It is true that to fix him with this liability it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable and proper to be ascertained in the suit in which the decree is made during the progress of the execution proceedings founded upon such decree."

(1) 11 B. L. R, 155.

The case of *Shankar Dial* v. *Amir Haidar* (1) is distinguishable. In that case the judgment-debtor objected to the attachment of certain property on the ground that such property was in his possession as trustee for an endowment, and not in his own right, and it was held that the objection, although made by the judgment-debtor, was one properly falling under ss. 278-283, Civil Procedure Code, andt he order upon it was one not appealable, but that the remedy was by suit under s. 283. The case of *Nath Mal Das* v. *Tajammul Husain* (2) is also similarly distinguishable. The dispute in the case before us is not one of the nature to be dealt with under those sections of the Civil Procedure Code; but purely a question between parties to the suit and relating to its execution. The appeal is decreed, the lower appellate Court's decree set aside, and the suit is dismissed with costs.

MAHMOOD, J.—I concur entirely, not only in the conclusion at which my learned brother Oldfield has arrived, but also in the reasoning which leads up to that conclusion. I, however, wish to add that the only case of importance cited against the view taken by us is *Kanai Lall Khan* v. *Sashi Bhuson Biswas* (3). That case is not on all fours with the present, but there are a great many *dicta* in the earlier part of the judgment which have a bearing upon this case, and go to contradict the principle laid down by my brother Oldfield to-day. I have studied the judgment, and reading the Privy Council case cited therein, I confess, with due deference, I cannot place the same interpretation as that adopted by the Calcutta Court. It seems to me that the turning point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor in raising objections of execution of decree against any property pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. If in the future regular suit he can plead no title other than that which he himself personally held *in his own right* a the time when execution was sought against the property, the bar provided by s. 244 of the Civil Procedure Code would operate, because

(1) I. L. R., 2 All. 752. (2) *Supra* p. 36.
(3) I. L. R., 6 Calc. 777.

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such questions could be adjudicated upon in proceedings relating to the execution of the decree within the meaning of cl. (c) of the section read in the light of the Privy Council ruling to which reference has already been made. On the other hand, if the judgment-debtor pleads a title which he does not hold in his own right, but merely as a trustee of an interest totally different from his own, the mere identity of the person of the judgment-debtor would not bar the adjudication upon a right which could not be adjudicated upon in the execution proceedings, and for this reason, that the judgment-debtor *as such* had no interest in saving the property from the consequences of the execution. This I understand to be the *ratio decidendi* adopted by my brother Oldfield in *Shankar Dial* v. *Amir Haidar* (1), which I followed in *Nath Mal Das* v. *Tajammul Husain* (2). I still adhere to that view, and therefore concur in the order proposed by my learned brother.

Appeal allowed.

1885 *February* 27.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

AMOLAK RAM AND ANOTHER (DECREE-HOLDERS) *v.* SAHIB SINGH (JUDGMENT-DEBTOR)*.

Temporary injunction—Stay of sale in execution of decree—Practice—Notice to opposite party—Civil Procedure Code, ss. 492, 494.

Where a Court made an order granting a temporary injunction under s 492 of the Civil Procedure Code, without directing notice of the application for injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex-parte*, without the other side being given an opportunity to show cause, *held* that the order was irregular.

Where ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, *held* that, inasmuch as what was advertised to be sold was the rights and interests of the plaintiff's father in the property, and it could not, be said that the property was being "wrongfully sold in execution of a decree" and the application on the face of it disclosed no sufficient ground to warrant an order under s. 492 of the Civil Procedure Code being made as prayed, the temporary injunction ought not to have been granted.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

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* First Appeal No. 163 of 1884, from an order of Lala Cheda Lal, Offg. Subordinate Judge of Aligarh, dated the 15th November, 1884.

(1) I. L. R., 2 All. 752. (2) *Supra*, p. 36.

Mr. *G. E. A. Ross*, Mr. *T. Conlan*, and Babu *Ratan Chand*, for the appellants.

The respondent did not appear.

STRAIGHT and BRODHURST, JJ.—This is an appeal from an order of the Subordinate Judge of Aligarh, dated the 15th November, 1884, granting a temporary injunction to stay the sale of certain property under s. 492 of the Civil Procedure Code. Before disposing of this appeal, it is necessary to refer to a few facts mentioned to us by the learned counsel for the appellant, and which we must take to be correct, as the respondent has not appeared either in person or by counsel to contradict them. It appears that on the 8th June, 1880, Amolak Ram and Phul Chand advanced to Naubat and others a sum of Rs. 50,000. On the 20th September, 1881, the appellants obtained a decree for Rs. 58,513. On application being made for the sale of this property against which this sum was secured by execution of the decree, the property being ancestral, the decree was transferred for execution in due course to the Collector, and the 7th January, 1882, was fixed for the sale of the property. An application was made for the postponement of the sale, which was granted, and the 20th April, 1882, was fixed for the sale of the property. On the 19th April, 1882, another application was made for the postponement of the sale, which was again postponed, and the 20th June, 1882, was fixed for the sale of the property.

Lakhan Singh, one of the sons of the judgment-debtor, instituted a suit, and on his application the sale was again postponed. On the 11th December, 1882, Lakhan Singh's plaint was rejected as insufficiently stamped. On the 19th February, 1883, Lakhan Singh again sued, paying the proper amount of court-fees, and again applied for the postponement of the sale, which was again postponed. This suit was also thrown out, and Lakhan Singh appealed to this Court, and applied for postponement of the sale. This appeal was rejected, and the sale was ordered to be proceeded with.

At this stage, the second son of the judgment-debtor instituted a suit, and on the 15th November, 1884, he made the following application:—"The suit was instituted to recover possession of

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two-thirds of 5 biswas in mauza Jalesar, 10 biswas of mauza Ismailpur, and two-thirds of mauza Kutra and to protect the same from the decrees of judgment-creditors. The 2nd December, 1884 was fixed for laying down the issues. The rights in all the three above-mentioned villages have been advertised for sale on the 20th November, 1884, in execution of a decree held by Amolak Ram and Phul Chand, defendants. Hence it is hereby prayed that the auction-sale of the rights in the three villages may be postponed pending the decision of the case." The order passed by the Subordinate Judge is as follows :—" A reference to the record of the case of the regular suit shows that a regular suit regarding these properties is pending. Ordered that the auction-sale fixed for the 20th November, 1884, be postponed."

It is clear that, in waiting up to the 15th November, 1884, in making this application, there was an unnecessary delay on the part of the plaintiff. But, apart from this, by s. 494 of Act XIV of 1882, before granting an injunction under that section, it is directed that " the Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by delay, direct notice of the application for the same to be given to the opposite party."

Now the Subordinate Judge in this case did not direct notice to be issued to the other side of this application, and his order directing the stay of sale was made *ex-parte*, without the other side being given an opportunity to show cause. On this ground alone the order is open to exception.

Again, before an order under s. 492 can be made, it must be shown that the property was about to be " wrongfully sold in execution of a decree." Now in this case what was advertised to be sold was the rights and interests of the plaintiff's father in this property, and it cannot be said that the property was being " wrongfully sold in execution of a decree." Besides, the application on the face of it discloses no sufficient ground to warrant an order under s. 492 being made as prayed. The appellant could have moved the Subordinate Judge to discharge the injunction under s. 496 of the Code, but he has not done so, and has come up directly in appeal before us. Under the circumstances of the

case, the only order that we think proper to make is, that the order of the Subordinate Judge directing stay of sale of the property be set aside, and that execution should proceed, subject to any proper application that the respondent may be advised to make.

Appeal allowed.

FULL BENCH.

1885
March 7.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

INDAR SEN AND ANOTHER (DEFENDANTS) *v.* NAUBAT SINGH AND OTHERS (PLAINTIFFS.)*

Act XII of 1881 (*N.-W. P. Rent Act*), *s. 7—Usufructuary mortgage—Ex-proprietary tenant—Sír-land.*

Held by the Full Bench (OLDFIELD and BRODHURST, JJ., dissenting) that a person who creates a usufructuary mortgage of zamíndári property becomes an ex-proprietary or occupancy-tenant of the sír-land under s. 7 of the N.-W. P. Rent Act (XII of 1881).

Per PETHERAM, C.J.—A usufructuary mortgagee is, for the time being, the proprietor of the property, inasmuch as a proprietor is the person entitled to exclusive possession at the time; and the intention of the Legislature, as expressed in s. 7 of the Rent Act, is that when a zamíndár ceases to be entitled to occupy the sír land as proprietor, he shall have the right to occupy it as an ex-proprietary tenant under s. 5. *Bhagwan Singh* v. *Murli Singh* (1) dissented from.

Per STRAIGHT, J.—The words "loss" and "part with" in s. 7 of the Rent Act were intended to cover all cases in which a proprietor of land has either voluntarily or by operation of law deprived himself permanently or temporarily of the power to exercise full proprietary right over his property.

Per MAHMOOD, J.—The meaning of the words "proprietary rights" in s. 7 of the Rent Act is equivalent to that of the term "full ownership" corresponding to *dominium* in the Roman Law and fee simple estate in English Law. The right of a usufructuary mortgagee cannot be called proprietorship; and, having regard to s 58 of the Transfer of Property Act, the execution of a usufructuary mortgage does not amount to a transfer of the proprietary right.

The word "lose" as used in s. 7 of the Rent Act means the transfer of proprietary rights otherwise than by the will of the owner in consequence of same incident of law. The term "part with" is a general expression including both absolute and temporary alienation; and a usufructuary mortgage is a "parting with" some of the incidents of ownership and falls within the purview of s. 7,

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* First Appeal, No. 18 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 19th May, 1883.

(1) I. L. R., 1 All. 459.

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inasmuch as the rights of possession and of the enjoyment of the usufruct are transferred from the mortgagor to the mortgagee, though such a transfer does not amount to a total alienation of proprietorship. *Bhagwan Singh* v. *Murli Singh* (1) dissented from. *Gopal Pandey* v. *Parsotam Das* (2), *Ganga Din* v. *Dhurandhar Singh* (3), and *Gulab Rai* v. *Indar Singh* (4) referred to.

Per OLDFIELD, J.—The words "lose or part with his proprietary rights in any mahal" in s. 7 of the Rent Act mean a loss or parting which divests absolutely of all proprietary rights, leaving no interest of a proprietary kind in the mahal; this does not happen in a usufructuary mortgage, and therefore the latter is not a loss of or parting with proprietary rights, within the meaning of s. 7. *Bhagwan Singh* v. *Murli Singh* (1) approved.

Per BRODHURST, J.—The word "lose" in s. 7 of the Rent Act means involuntarily lose, as for instance, by auction-sale, and "part with" means voluntarily and entirely divested of by means, *e.g.*, of gift or private sale. "Proprietary rights" means the whole of the proprietary rights; and a usufructuary mortgagor of zamíndári property cannot be said to have lost or parted with his proprietary rights therein and therefore does not, under the provisions of s. 7 of the Rent Act, become an ex-proprietary or occupancy-tenant of the sir-land.

THE plaintiffs in this case claimed possession of shares in three villages, "with all the appurtenances," and of three shops, under a deed of usufructuary mortgage, dated the 3rd April, 1882, executed in their favour by the defendants. The deed of mortgage transferred the shares in the villages in question, "together with all the rights appended and detached, cultivated, and uncultivated lands, village sites, groves, wells, jungles, ponds, fruit and timber trees, and trees planted and of spontaneous growth, and *khudkasht* right" belonging to the shares. The lower Court gave the plaintiffs a decree as claimed. The defendants appealed to the High Court on the ground, amongst others, that "the decree for possession of the sír-land is contrary to the terms of the law."

The Divisional Bench (PETHERAM, C. J., and BRODHURST, J.,) hearing the appeal, with reference to this ground, referred to the Full Bench the following question :—

"Whether a person who creates a usufructuary mortgage of zamíndári property becomes an ex-proprietary or occupancy-tenant of the sír-land under s. 7 of the Rent Act."

Babu *Ratan Chand*, for the appellants.

(1) I. L. R., 1 All. 459.
(2) I. L. R., 5 All. 121.
(3) I. L. R., 5 All. 495.
(4) I. L. R., 6 All 54.

Mr. *J. Simeon*, for the respondents.

PETHERAM, C. J.—The question is, whether a zamíndár, who mortgages his mahal by usufructuary mortgage, and gives possession to the mortgagee, parts with his proprietary rights by that transaction. This of course depends upon what a usufructuary mortgage is. A mortgage of this description is defined by s. 58 of the Transfer of Property Act to be a transfer of an interest in specific immoveable property for the purpose of securing the payment of money, &c., and the mortgagor delivers possession of the property to the mortgagee, and authorizes him to retain possession and receive the entire profits. Under such a transaction it is evident that the mortgagee is entitled to the *exclusive possession* of the property until the loan is repaid, and becomes, in my opinion, the proprietor of the property during that time, inasmuch as I understand the proprietor of a thing to be the person entitled to the exclusive possession of it *at the time.* If it be true that the transaction has constituted the mortgagee the proprietor of the property, though only for the time being, it must follow that the mortgagor has parted with his proprietary rights as he has ceased to be proprietor. The difficulty in the case really arises from the decision of a Division Bench of this Court in the case of *Bhagwan Singh* v. *Murli Singh* (1). Speaking for myself, I can only say that I think that decision is wrong, and that I decline to follow it. In my opinion, the meaning of the Legislature is, that when a zamíndár ceases to be entitled to occupy the sír-land as proprietor, he shall have the right to occupy it as an ex-proprietary tenant under s. 5 of the Rent Act. It follows that I answer the question in the affirmative.

STRAIGHT, J.—I am of the same opinion. The mortgage transaction between the parties to the suit, out of which the reference has arisen, transferred the legal estate in the zamíndári to the mortgagee, and entitled him to possession thereof to the exclusion of the mortgagor, which possession can only be terminated by surrender of his document of title and reconveyance, either voluntarily made or enforced through the medium of a redemption suit. It is true that the words "lose" and "part with" in

(1) I. L. R., 1 All., 459.

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s. 7 of the Rent Act have no special legal significance, but they appear to me to have been intended to cover all cases in which a proprietor of land has either voluntarily or by operation of law deprived himself permanently or temporarily of the power to exercise full proprietary right over his property. The mischief at which this provision of the statute aimed is too well understood to need repetition here, and I can only add that if a usufructuary mortgage be held not to be a "losing" or "parting with" the proprietary right, then in future a usufructuary mortgage will invariably be resorted to instead of a sale, so as to defeat the ex-proprietary right.

MAHMOOD, J.—In this case I have arrived at the same conclusion as the learned Chief Justice and my brother Straight, but as the grounds of my conclusion are, though in a very small degree, different from those which they have stated, I think it necessary to explain my own reasons. Before I can go into the question referred to the Full Bench, it is necessary to consider the meaning of the words "proprietary rights" in s. 7 of the Rent Act (XII of 1881). I understand these words to be equivalent to the term "ownership," which is not merely a word of technical legal meaning, but which, I hold, must, according to the general canons of construction, be interpreted in its broadest possible meaning in the absence of words to restrict such interpretation. In that light, the idea of full ownership corresponds to what, in the Roman Law, is termed "*dominium*," or to what, in the English Law, is called the "fee-simple estate." This has been defined by Austin in the following manner :—"The idea of absolute property is a right indefinite in point of user, unlimited in extent of duration, and alienable by the actual owner from every successor who, in default of alienation by him, might take the subject of it." This appears to me to correspond to the meaning of the term "proprietary rights" as used in s. 7 of the Rent Act. It is, as I take it, an elementary proposition of jurisprudence that *dominium* is an aggregate of component rights, such as the right of actual possession, the right of enjoying the usufruct of land, the power of sale, and so on. In my judgment in the case of *Gopal Pandey* v. *Parsotam Das* (1), I explained what full ownership

(1) I. L. R., 5 All. 121.

means, and what its incidents are, and also what the exact nature of occupancy-right is in these Provinces. I there said that a person in full ownership can alienate any one or more of its component elements. The question before the Court in that case related to simple mortgage or hypothecation, but my argument applies also to the case now before us, because I said, adopting another passage from Austin, that the full ownership being composed of these rights "indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration," any alienation of these rights would be a mortgage, so long as the object of the alienation was security for the payment of a debt in money. I further said, quoting from another jurist, that any "one or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right of ownership, called by the Romans *nuda proprietas*, remains unimpaired. The elements of the right which may thus be disposed of without interference with the right itself,—in other words, which may be granted to one person over an object of which another continues to be the owner,—are known as *jura in re aliena*."—(Holland on Jur., p. 144). Such being my views as to the nature of proprietorship, I am unable to hold that the right of the usufructuary mortgagee is a right which can be called a transfer of proprietorship; and having regard to s. 58 of the Transfer of Property Act, and especially cl. (*a*), governing the whole section, and cl. (*d*), referring in particular to usufructuary mortgage, I cannot agree in holding that the execution of a usufructuary mortgage amounts to a transfer of the proprietary right. But here my difference with the learned Chief Justice ends. Upon the rest of the question, I entirely agree with him. The question is then limited to this—what is the meaning of the words "lose" and "part with" as used in s. 7 of the Rent Act?—in other words, to the interpretation of two common English expressions. As to the word "lose," it means, in my opinion, the transfer of proprietary rights otherwise than by the will of the owner, as, for instance, by the sharer falling into arrears of Government revenue, or by a decree of a Civil Court, or by a partition of the estate sanctioned by the supreme revenue authorities, or by some other incident of law. With these, however, we are not now concerned.

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But as to the expression "part with," that is the sole point on which this case, in my opinion, depends. I think that "part with" does not exclude the idea of an alienation which falls short of sale or any other incident of law which absolutely transfers ownership out and out To "part with" is an expression philologically connected with the term "separate," it means to be separated from something. But a man may separate himself from a thing either for ever or only temporarily, and in this sense to "part with" may be called the *genus*, of which absolute alienation and temporary alienation are *species* In other words, the phrase must be taken to cover both forms of alienation—an interpretation which is in keeping with the rule of construction that words must be understood in their broadest meaning unless there are reasons to restrict the meaning. Here no such reasons exist, and, as the learned Chief Justice and my brother Straight have implied, a usufructuary mortgage is a "parting with" some of the incidents of ownership, because the most important elements of ownership are the right of possession and of the enjoyment of the usufruct, though temporary and for a specific object. These rights are, in the case of usufructuary mortgage, transferred from the mortgagor to the mortgagee, and though such a transfer does not amount to a total alienation of proprietorship, it does fall within the expression "part with" in s. 7 of the Rent Act. I do not hold this opinion on theoretical grounds only, but also on grounds of public policy as apparent from the statute itself. I mean by this that the right of occupancy in sír-land has been obviously intended by the Legislature as a protection to the owners of zamíndári shares in villages in India against their own imprudence. Now the case of *Bhagwan Singh* v. *Murli Singh* (1) goes directly against this view. In regard to that case, I will not say anything in the nature of an argument against the *ratio decidendi* upon which the judgment was based, beyond the observation that the reasons upon which my view is founded do not appear to have been considered. I agree with the learned Chief Justice in dissenting from that judgment. In another case—*Tarapat* v. *Kamalnain* (2)—which is binding upon the Revenue authorities in these Provinces, the Sudder Board of Revenue held the same view as the decision of

(1) I. L. R, 1 All. 459. (2) N.-W. P. Legal Remembrancer, 1880, R. &, R. Series, 212.

the Division Bench of this Court to which I have referred. The reasons which prevent me from agreeing with the one decision apply equally to the other. In the Full Bench case of *Gopal Pandey* v. *Parsotam Das* (1) I took pains to explain my views of the nature of occupancy-rights in these Provinces, and held that such rights were not capable of transfer by their holder, in the sense of s. 9 of the Rent Act, even by means of simple mortgage. I regret, and I say this with due respect, that that decision was not accepted by the whole Court, but in a subsequent case the Full Bench in *Ganga Din* v. *Dhurandhar Singh* (2) laid down that a usufructuary mortgage was a "transfer" under s. 9 of the Rent Act. It is not necessary for me to consider whether the *ratio decidendi* in the one case can possibly be different to that in the other, as it is enough for the purposes of the case to accept the latter ruling which, in my view of the law, accords with the reasoning upon which my judgment in the former case proceeded. Now what is an ex-proprietary tenancy? It is nothing more or less than a right of occupancy which does fall within the prohibition of s. 9, and it was so held by the Full Bench in *Gulab Rai* v. *Indar Singh* (3), the effect of which I take to be a reversal of an earlier ruling of a Division Bench of this Court in *Markundi Dial* v. *Rambaran Rai* (4). It appears to me that if the ruling in *Gulab Rai* v. *Indar Singh* is right, and I take it to be right, no other view than that taken by the learned Chief Justice and my brother Straight is possible, because if a person holding an occupancy-right cannot alienate it by sale, it follows that he cannot by usufructuary mortgage create any such interest in the usufructuary mortgagee as would deprive him of the occupancy-right generated by the statute. Any other view seems to me to involve the conclusion that a person executing a usufructuary mortgage of his zamíndári, including sír-land, might enable the usufructuary mortgagee to own the whole property at the end of sixty years when the right of proprietorship would cease by prescription, and the original owner would be prevented from keeping the occupancy-right, because during the continuance of the mortgage when the mortgagee would remain in possession, the sír-land would either be fallow (which is not likely), or the right

(1) I. L. R., 5 All. 121.
(2) I. L. R., 5 All. 495.
(3) I. L. R., 6 All. 54.
(4) I. L. R., 2 All. 735.

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of actual possession and cultivation thereof having once been conveyed to the mortgagee, he might let the land to tenants, and thus create rights which would take it out of the category of sír-land as defined in s. 3, cl. (4) of the Rent Act (XII of 1881). Such a result would, in my opinion, defeat the object of the statutory provision, and for these reasons my answer to the reference must be in the affirmative.

OLDFIELD, J.—The reply to this reference depends on the meaning to be put on the words "lose or part with his proprietary rights in any mahal" in s. 7 of the Rent Act.

In my opinion, they mean a loss or parting which divests absolutely of all proprietary rights, leaving no interest of a proprietary kind in the mahal. This does not happen in the case of a usufructuary mortgage.

A mortgage is defined in the Transfer of Property Act to be the transfer of an interest in specific immovable property for the purpose of securing the payment of money lent; and it becomes a usufructuary mortgage when the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property, and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in payment of the mortgage-money, and the mortgagor has a right to recover possession of the property when the money is paid. The mortgagee therefore holds the estate merely as a security for the debt, and not absolutely, and he has therefore only a qualified and limited interest in it, confined to the object of satisfying his debt, and so long as the right of redemption remains in the mortgagor, the full proprietary interest and right cannot be said to have passed from him to the mortgagee, the right to redeem being dependent on the mortgagor remaining proprietor or owner of the property.

In a sale, on the other hand, the proprietary rights pass in their full sense and absolutely. Sale is defined in the Transfer of Property Act to be a transfer of ownership in exchange for a price paid or promised, or part paid and part promised. The transfer of ownership marks the difference between it and mortgage.

The same distinction will be observed in the definition of English mortgage, by which the property is transferred absolutely. Nothing of this sort happens in a usufructuary mortgage, and therefore the latter is not a loss of or parting with proprietary rights, as I understand those words in s. 7.

This is the view taken in *Bhagwan Singh* v. *Murli Singh* (1) in which I concur.

BRODHURST, J.—The question that has been referred to us is whether a person who creates a usufructuary mortgage of zamíndári property becomes an ex-proprietary or occupancy-tenant of the sír-land under s. 7 of the Rent Act (XII of 1881). Paragraphs 1 and 2 of s. 7 of the Rent Act are as follows:—"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages."

"Persons having such rights of occupancy shall be called 'ex-proprietary tenants,' and shall have all the rights of occupancy-tenants."

I consider that the words "who may lose" in paragraph 1 mean involuntarily lose, for instance, by auction-sale, and that the words "part with" mean voluntarily and entirely divested of, by means, *e. g.*, of gift or private sale. If the Legislature had intended that the person making a usufructuary mortgage should thereby become an ex-proprietary tenant of the sir-land, there could have been no difficulty in expressing their meaning in clear and unambiguous language. If the words "every person who may hereafter lose or part with his proprietary rights in any mahal" are meant to include every person who may, for however short a time, make a temporary transfer of a small portion of his zamíndári property, I think it cannot but be admitted that the language used to convey that meaning is extremely obscure, and is calculated to mislead a large proportion of the persons interested in understanding it. Obviously a person cannot, in the general acceptation of

(1) I. L. R., 1 All. 459.

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the words, become an "ex-proprietary tenant," until he has lost or parted with his proprietary rights, and, in my opinion, the words "proprietary rights" in s. 7 of the Rent Act clearly mean the whole of his proprietary rights. "Usufructuary mortgage" is defined in cl. (*d*), s. 58 of the Transfer of Property Act, as follows:—"Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property, and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage, and the mortgagee an usufructuary mortgagee." A zamíndár may make a usufructuary mortgage of the whole or of a portion of his estate on terms that will enable him to redeem the mortgage whenever he has the means to do so. He may mortgage the property for even less than half its value, and subsequently he may sell it for double the amount of the mortgage-money. A person who can redeem the property that he has mortgaged, or can, whenever it suits him to do so, sell that property, either to the mortgagee or to a third person, cannot, in my opinion, be said to have "lost or parted with" his proprietary rights in the property.

A person can undoubtedly be the proprietor of an estate without being in actual possession of it. A person takes a house or a farm on a lease for a term of years; he is on certain conditions entitled to exclusive possession of the house or farm for the term of years, but nevertheless he is not the proprietor of the house or farm, but is merely the tenant in temporary possession. The money which he pays as rent to the landlord is paid on certain dates within the tenancy, whereas the money that is paid by the mortgagee with possession to the mortgagor—the landlord—is generally paid prior to occupation by the mortgagee. The mortgagor, being in immediate want of cash, raises a loan by giving over to the money-lender temporary possession of the whole or of a portion of his estate, and by this mortgage transaction he obtains, as it were, his rents in advance. My opinion on the question referred to us is in accordance with the judgment of a Bench of this Court (Pearson and Spankie, JJ.) in the case of

Bhagwan Singh v. *Murli Singh* (1). That judgment was delivered on the 27th July, 1877, when Act XVIII of 1873 was the Rent Act in force, and on the 26th October, 1880, it was approved of and followed by both Members of the Sudder Board of Revenue (Messrs. Carmichael and Plowden) in the case of *Tarapat* v. *Kamalnain* (2). I consider that not only are the judgments above mentioned in accordance with the law, but that no other conclusions could have been arrived at without straining the language of the section.

I believe it to be a duty of the Legislature, and one which they duly perform, to keep themselves acquainted with the reported judgments of the High Courts and Sudder Boards of Revenue, in order that the laws referred to in those judgments may, when requisite, be amended. The two judgments above mentioned were binding on all subordinate Civil and Rent Courts throughout the North-Western Provinces, and therefore, if the Legislature had considered that a wrong construction had, in those judgments, been placed on the meaning of s. 7 of Act XVIII of 1873, they would surely have felt it their imperative duty to amend the law and to recast the section, so that no doubt could possibly remain as to its meaning; but Act XII of 1881 did not come into force until nearly four years after the date of the High Court judgment, and the two paragraphs of s. 7, Act XVIII of 1873, were reproduced in precisely the same words in s. 7, Act XII of 1881, with the addition of a third paragraph, which in no way affects the present case. I am satisfied, first, from the language of s. 7, and secondly, from that section having been reproduced in Act XII of 1881, notwithstanding the two judgments above referred to, that those judgments are correct, and therefore my answer to the reference is, that a person who creates an usufructuary mortgage of zamíndári property does not, under the provisions of s. 7 of the Rent Act, become an ex-proprietary or occupancy-tenant of the sir-land.

(1) I. L. R., 1 All. 459.
(2) N.-W. P. Legal Remembrancer, 1880, R. & R. Series, 212.

1885
March 13.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

KALLU AND ANOTHER (DECREE-HOLDERS) *v.* MUHAMMAD ABDUL GHANI AND ANOTHER (JUDGMENT-DEBTORS)*.

Execution of decree—Act XV of 1877 (*Limitation Act*), *sch* ii, *No.* 179—*Application or "step in aid of execution"—Application by pleader for execution after decree-holder's death.*

Where a decree holder died without taking out execution of his decree, and, two days after his death, his pleader made an application for execution on his behalf, this being the first application of the kind,—*held* that, inasmuch as the authority of a pleader ceases at the moment of his client's death, the application was invalid, and was not such an application or step in aid of execution of the decree as could save a subsequent application for execution by the decree-holder's heirs from being barred by limitation.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Munshi *Kashi Prasad*, for the appellants.

Babu *Ram Das Chakarbati* and Munshi *Ram Prasad*, for the respondents.

MAHMOOD, J.—We are of opinion that this appeal should be dismissed. The facts necessary for consideration in connection with the point of law seem to be as follows:—A decree, dated the 13th February, 1880, was held by one Ram Lal, in whose favour it had been passed. No execution appears to have been taken out by the original decree-holder, who died on the 11th February, 1883. Two days after his death, on the 13th February, an application was made on his behalf by his pleader for execution, this being the first application of the kind. The Court executing the decree admitted the application as being within time, but the judgment-debtor appealed from the order passed on the application to the District Judge, who passed an order that "the heirs might be allowed to carry on the execution;" and he seems to have directed the heirs to make an application within two days from the date of his decision. It is unnecessary to consider whether or not such a direction was legal; but, as a matter of

* Second Appeal No 51 of 1884, from an order of C. W. P. Watts, Esq, Offg District Judge of Saháranpur, dated the 25th January, 1884, reversing an order of Babu Ishri Prasad, Munsif of Deoband, dated the 22nd November, 1883.

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fact, no application for execution was made by the present appellants, the heirs of the decree-holder, until the 30th August, 1883, and it is in connection with the application then made that the present appeal has been preferred.

The Court of first instance, regarding the judgment of the District Judge as conclusive as to the validity of the former application, entertained the present as within time. There was however no such adjudication as would be covered by the Privy Council ruling in the case of *Ram Kirpal* v. *Rup Kuari* (1), and therefore the District Judge on appeal held that execution of the decree was barred The appeal has now come before us, and the whole matter depends on the question whether the application for execution of the 13th February, 1883, was such an application or step in aid of execution of decree as would prevent limitation from running out in regard to this application. Now it is clear, and it has been admitted, that the decree-holder had died two days before the application was made. No valid application could be made by his pleaders, because the authority of a pleader ceases at the moment of his client's death, and therefore we hold that the period of limitation should be calculated from the date of the decree up to the date of the present application, and that being a period of more than three years, the application is barred, and the appeal must be dismissed with costs.

BRODHURST, J., concurred.

Appeal dismissed.

Before Mr. Justice Straight and Mr Justice Brodhurst.

1885 *March* 16.

AHMAD KHAN (JUDGMENT-DEBTOR) *v.* MADHO DAS (OBJECTOR)*.

Civil Procedure Code, ss. 322B, 322D—Dispute as to extent of judgment-debtor's liability to claim—Appeal from order disposing of dispute—Nature of appeal—Act VII of 1870 (*Court Fees Act*), *sch.* ii, *No.* 11.

An appeal from the decision of a dispute under s. 322*B* of the Civil Procedure Code falls directly within the exception of art. 11 of sch. ii of the Court-Fees Act (VII of 1870), and the memorandum of appeal should therefore be presented as for a decree in a suit, upon an *ad valorem* stamp.

Srinivasa Ayyangar v. Peria Tambi Nayakar (2) dissented from.

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* First Appeal No 141 of 1884, from an order of J. L. Denniston, Esq., Offg. District Judge of Ghazipur, dated the 13th May, 1884.

(1) I. L. R., 6 All 269, L. R., 11 Ind Ap. 37.

(2) I. L. R., 4 Mad. 420.

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THE facts of this case are sufficiently stated for the purposes of this report in the order of Straight, J.

Shah *Asad Ali*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondent.

STRAIGHT, J.—It will be convenient, in order to make the question of law raised for our decision clear, to state the following facts:—A money decree was obtained against the appellant Ahmad Khan, and it was transferred to the Collector under the Rules of 1880, prepared in pursuance of s. 320 of the Civil Procedure Code. The Collector thereupon issued notices in manner provided by s. 322A, and thereupon the respondent Madho Das submitted a claim showing that Ahmad Khan was indebted to him in an aggregate amount of Rs. 13,044-4-6 due in respect of an hypothecation bond and two hundis. Ahmad Khan disputed the accuracy of the amount of this demand, alleging, among other matters, that he had made certain payments for which he had not been given credit, that the conditions of the bond as to payment of interest on default were penal, and that no interest was recoverable in respect of the hundis after due date. A dispute thus having arisen, within the meaning of the 3rd paragraph of s. 322B, the Collector struck certain issues, and submitted them as therein provided to the Judge for his determination. That officer dealing with the matter remarks:—"These were virtually the issues of the Civil Court for some thousands of rupees." He further, in accordance with findings recorded by his predecessor in office on the subject, declared that the bond should bear interest at the given rate or rates, and the same with regard to the hundis; and he forwarded to the Collector a statement of the accounts as embodying his decision. Ahmad Khan, being injuriously affected by this decision, now appeals, as from a miscellaneous order, on various grounds, and a preliminary objection is taken by the respondent to the hearing of the appeal, on the ground that, looking to the terms of s. 322D, it should have been presented as from a decree in a suit upon an *ad valorem* stamp, and not as an appeal from an order on a Rs. 2 stamp. I think this contention is a sound one and must prevail. By art. 11 of sch. ii of the Court-Fees Act

it is provided that the stamp payable in respect of a memorandum of appeal to a High Court, "when the appeal is not from an order respecting a plaint or from a decree or *order having the force of a decree*" shall be two rupees. Now, s. 322D of the Procedure Code explicitly enacts that the decision of a dispute under s. 322B "shall, as between the parties thereto, have the force of, and be appealable as, a decree." The appeal before us, therefore, is an appeal from a decision which is declared to have the force of a decree and to be appealable as such, and it falls directly within the exception of art 11 of sch. ii of the Court-Fees Act above-mentioned. It should, therefore, in my opinion, have been preferred upon the stamp provided for appeals from decrees, and, being insufficiently stamped, we cannot entertain it. I am aware that in taking this view I have the authority of Turner, C. J. [*Srinivasa Ayyangar* v. *Peria Tambi Nayakar* (1)] to the contrary; but I regret I am unable to accept it. With deference to that learned Judge, I cannot help thinking that his attention was not directed to the article of the Court-Fees Act, which, according to my view, determines the question. It seems to me that, looking to the nature of the proceedings to be held under s. 322B for the investigation of the nature and extent of decrees and claims, and the determination of the priorities of such decrees and claims, it was intended that those decree-holders or claimants, who chose to submit their decrees or claims to the Collector pursuant to s. 322A, should, when a dispute arises of the kind mentioned in s. 322B., be bound, if it is referred for decision to the Civil Court, by the decision of such Civil Court, as by a decree in a suit; moreover, it may be remarked that this decision might, as in the case now before us, often determine very important questions, the investigation of which would require the bestowal of much time and labour by the Civil Court. In view of this state of things, it does not appear to me to be unusual or unwarrantable that appeals from such a decision should be held to require an *ad valorem* stamp. The memorandum of appeal must be returned to the appellant in order that he may supply the requisite stamp-paper within one month from this order.

BRODHURST, J.—I concur.

(1) I. L. R., 4 Mad. 420.

1885
March 19.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

SIRBADH RAI AND OTHERS (DEFENDANTS) *v.* RAGHUNATHPRASAD (PLAINTIFF).*

Mortgage—First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property.

The purchasers of the equity of redemption of land which had been mortgaged in 1866 and 1874 to different persons, paid off the prior mortgage. The second mortgagee sued to bring the property to sale in satisfaction of his mortgage.

Held that the prior mortgage was not extinguished, and that the purchaser of the equity of redemption had, by paying off that mortgage, acquired an equitable right to its benefits, which they could use against the second mortgage. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1) followed.

Per OLDFIELD, J., (MAHMOOD J. dissenting), that the prior mortgage afforded a defence against the claim of the second mortgagee seeking to bring the property to sale. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1) followed.

Per MAHMOOD, J., that the ruling of the Privy Council in *Gokaldas Gopaldas* v *Puranmal Premsukhdas* (1) did not go beyond laying down the proposition that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes, but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession.

Also *per* MAHMOOD, J., that although the persons who had paid off the prior mortgage were entitled to claim its benefits, they could not be understood to have acquired rights greater than those which the prior mortgagee himself possessed; that as holders of the equity of redemption they could not resist the suit which aimed at enforcing a valid security, and, as persons entitled to the benefits of the prior mortgage, they were at best in the position of assignees of that mortgage; that the union of the two capacities could not confer upon them rights higher than those which the mortgage they had paid off created; that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security without paying off the prior mortgage, so long as such enforcement does not clash with the rights secured by the prior mortgage; and that therefore the purchaser of the equity of redemption held that right subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the prior mortgage did not place the equity of redemption on a better footing, though it entitled them to the benefits of that mortgage secured to them in the same manner as to the original mortgagee whose rights they had acquired by subrogation. *Gaya Prasad* v. *Salik Prasad* (2), *Ramu Naikan* v. *Subbaraya Mudali* (3), and *Mulchand Kuber* v. *Lallu Trikam* (4) referred to.

* Second Appeal No. 1460 of 1883, from a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Ghazipur, dated the 28th August, 1883, modifying a decree of Babu Rajnath Prasad, Munsif of Balia, dated the 29th March, 1883.

(1) I. L. R., 10 Calc. 1035, L. R., 11 Ind. Ap. 126.
(2) I. L. R., 3 All. 682.
(3) 7 Mad. H. C. Rep. 229.
(4) I. L. R., 5 Bom. 404.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshi *Sukh Ram*, for the appellants (defendants).

Lala *Lalta Prasad*, for the respondent (plaintiff).

OLDFIELD, J.—It appears that Jarawan Singh and Daulat Kuar mortgaged three bighas of land, in May, 1866, for Rs. 401 to one Lachman Rai, and subsequently, in June, 1874, mortgaged their four annas share, which included the said land, to plaintiff.

In June, 1878, the appellant bought the equity of redemption and paid off the prior mortgage out of the purchase-money. The plaintiff-respondent seeks in this suit to bring the said land to sale in satisfaction of his subsequent mortgage. The first Court disallowed this portion of the claim, but it was decreed by the Subordinate Judge, and the appeal, which takes exception to the decree on this point, must prevail. It has been established by rulings of this Court that, where a purchaser of the equity of redemption has a prior mortgage of his own, or gets in a prior mortgage, the prior mortgage is not necessarily extinguished, but will be presumed to exist for his benefit against subsequent mortgagees: and the law to that effect has now been settled by the recent decision of the Privy Council in *Gokuldas Gopaldas* v. *Puranmal Premsukhdas* (1), a case somewhat similar to the one before us, where one purchasing the equity of redemption had paid off a prior mortgage on certain house property, and it was held that the prior mortgage had not become extinguished, and he had a good detence to the suit for possession of the property brought by a subsequent mortgagee.

Their Lordships remark that in these cases "the obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it, and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention shall be ascribed to him? The ordinary rule is, that a man having the right to act in either of two ways, shall be assumed to have acted according to his interest."

So in the case before us, I hold that the prior mortgage was not extinguished, and that it affords a defence against the claim

(1) I. L. R., 10 Calc 1035; L. R., 11 Ind. Ap. 126.

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seeking to bring the property to sale. I would modify the decree of the lower appellate Court, and restore that of the first Court with costs.

MAHMOOD, J.—The facts of the case necessary for the disposal of this appeal seem to be these :—

The land in dispute in this appeal, namely, plot No 111, was originally mortgaged, in 1866, to one Lachman. Subsequently, on the 9th June, 1874, the mortgagors executed another mortgage of a four annas share in the village, including plot No. 111, to the present plaintiff, and, on the 29th June, 1878, the mortgagors executed a deed of sale in respect of plot No. 111 in favour of the defendants-appellants for the purpose of raising money to pay off Lachman's mortgage of 1866 and other debts due by them to various creditors.

The object of this suit was to bring the four annas share to sale by enforcement of the lien created by the mortgage deed of the 9th June, 1874. The Court of first instance decreed the claim, but exempted the plot No. 111, on the ground that it had been purchased by the defendants-appellants by payment of consideration-money, which paid off Lachman's mortgage of 1866, which had priority over the plaintiff's mortgage of 1874.

The plaintiff appealed to the lower appellate Court, so far as the exemption of plot No. 111 was concerned, and that Court, without going into the merits of the case, modified the decree of the lower Court, by decreeing enforcement of lien against plot No. 111 also, on the ground that, even if the mortgage of 1866 had been satisfied by the purchasers of the plot, they could not claim the benefit of the priority of the mortgage, because the mortgage must be taken to have been extinguished for all purposes, and could not therefore be pleaded in defence of the plaintiff's suit, which was based upon the mortgage of the 9th June, 1874. In other words, the lower appellate Court held that the defendants-appellants purchased the land (on the 29th June, 1878) subject to the plaintiff's mortgage, and the land was therefore liable to be sold in enforcement of the plaintiff's lien, regardless of the fact that they had paid off Lachman's mortgage of 1866. The present appeal has been preferred by the defendants, pur-

chasers of plot No. 111, under the sale-deed of the 29th June, 1878. The facts of the case thus stated seem to me to raise two distinct questions of law. *First*, whether the discharge by the appellants of Lachman's mortgage of 1866 entitles them to the benefits of that mortgage, notwithstanding the purchase by them of land No. 111, to which that mortgage related; and *secondly*, whether the appellants can resist the plaintiff-respondent's claim to enforce his mortgage of June, 1874, by bringing the land to sale.

So far as the first question is concerned, I entirely concur with my brother Oldfield in the view that the appellants, as purchasers of the equity of redemption, have, by paying off Lachman's prior mortgage, acquired an equitable right to the benefits of that mortgage, which they can use against the plaintiff's mortgage. That in such cases the prior mortgage is not extinguished, but subsists in favour of the person paying off the mortgage, has been explained by Mr. Justice Story in s. 1035*c* of his celebrated work on Equity Jurisprudence (ed. 1877).

The rule was first enunciated in India by Mr. Justice Holloway in *Ramu Naikan* v. *Subbaraya Mudali* (1) in which that learned Judge disapproved the doctrine laid down by the English Courts in *Toulmin* v. *Steere* (2) which had some time been followed by the Bombay Courts—*Itcharam Dayaram* v. *Raiji Jaga* (3),—till a Full Bench of that Court in *Mulchand Kuber* v. *Lallu Trikam* (4) adopted the view of the Madras High Court. The rule was again followed in *Shantapa* v. *Balapa* (5) by a Division Bench of the same Court, and by this Court in *Gaya Prasad* v. *Salik Prasad* (6) and in *Ali Hasan* v. *Dhirja* (7). The doctrine has now been settled by the recent ruling of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Rremsukhdas* (8) in which the English cases on the subject were considered. The rule there laid down fully supports the view taken by my brother Oldfield, and indeed s 101 of the Transfer of Property Act (IV of 1882) and some other sections of that enactment appear to me to be based

(1) 7 Mad H. C. Rep. 229.
(2) 3 Mer 210.
(3) 11 Bom. H C. Rep 41.
(4) I L. R., 6 Bom. 404.
(5) I L. R, 6 Bom. 561.
(6) I L. R., 3 All. 682
(7) I. L. R, 4 All. 518.
(8) I. L. R., 10 Calc. 1035 L. R., 11 Ind. Ap. 126.

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upon the same principle of equity; I have therefore no doubt that the appellants in this case are entitled to the benefits of the priority of Lachman's mortgage of 1866, which they have paid off.

In regard to the second question, however, I confess, with regret, that I have difficulty in understanding the Privy Council ruling in the extensive sense in which my brother Oldfield has interpreted it. The ruling does not seem to me to go beyond laying the proposition in which I have already expressed my concurrence, namely, that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes; but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession. The rule appears to me to be a necessary consequence of the doctrine of subrogation, and it is obvious that to allow the possession of a prior usufructuary mortgagee to be ousted by a person holding a subsequent usufructuary mortgage, would be to violate the fundamental principle of the priorities of lien In the case before the Privy Council, the purchaser of the equity of redemption had paid off a prior usufructuary mortgage, which essentially carried with it the right to possession of the mortgaged property as the means of liquidating the mortgage-debt, and the object of the puisne usufructuary mortgagee's suit was to oust such possession by virtue of his mortgage. The suit, if decreed, would have operated in defeasance of an essential incident of the prior mortgage. It is clear that when the essential incidents of a prior incumbrance clash with the incidents of a subsequent incumbrance, the latter must give way, and the former must prevail. The principle is well expressed in the language of s. 48 of the Transfer of Property Act, which lays down that "where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created." This seems to me to be the essence of the rule of priority upon

which the Lords of the Privy Council seem to have acted by applying the doctrine of subrogation to the case, the effect of which I am considering, and I do not understand their Lordships' judgment to have laid down any rule which goes beyond the limits of this proposition.

Such being my interpretation of the ruling of the Privy Council in the case of *Gokaldas Gopaldas* (1), I cannot help feeling that the present case has a different aspect. The appellants, by paying off Lachman's prior mortgage of 1866, are no doubt entitled to claim the benefits of that mortgage, but they cannot, in my opinion, be understood to have acquired rights greater than those which Lachman himself possessed. It seems to me that the appellants possess two distinct capacities, *first* as holders of the equity of redemption, and, secondly, as persons entitled to the benefits of Lachman's mortgage of 1866. It is clear that in the former capacity they could not resist the suit which aims at enforcing a valid security, and in the latter capacity, the payment of the mortgage of 1866 can at best place them in the position of assignees of that mortgage (*vide* last sentence in Story's Equity Jurisprudence, s. 1035 *c*.)

But such position will not, as I understand the law, enable them to prevent sale of the property in enforcement of the plaintiff's mortgage of 1874, because such sale would not disturb or clash with the rights under the mortgage of 1866, which they have acquired by subrogation, and in their capacity, as *such*, the exercise of the plaintiff's rights cannot affect them. Nor can I hold that the union of the latter capacity with the former can in itself confer upon them rights higher than those which the mortgage they have paid off created. To hold the contrary view seems to me to amount to the proposition that the purchaser of the equity of redemption and the first mortgagee could, by a transaction entered into in *the absence of the intermediate incumbrancer* and irrespective of his interests, place him in a worse position than before. Such a doctrine would be analogous in principle to the rule of tacking, which the law of mortgage in this country, so far as I am aware, never recognized, and which has now been expressly negatived by s. 80 of the Transfer of Property Act.

(1) I. L. R., 10 Calc. 1035; L. R., 11 Ind. Ap. 126.

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The matter, therefore, resolves itself into the question, whether the holders of the rights of mortgage of 1866 could prohibit the enforcement of the mortgage of 1874; in other words, can a prior mortgagee prevent the sale of the equity of redemption in enforcement of a subsequent security?

It seems to me that, notwithstanding the mortgage, the mortgagor or the holder of the equity of redemption can alienate his rights by private sale, and it follows that he can do so by hypothecation. Such sale or hypothecation would, of course, be subject to the prior mortgage, and could in no manner disturb the priority of lien possessed by the prior incumbrancer or militate against his interests. So long as there can be no conflict between the rights created by the prior and the puisne incumbrances, it appears to me that property subject to two or more incumbrances can be sold in enforcement of any one of them, and the purchaser in such sale would acquire such right as the position of the incumbrance with reference to the rule of priority could convey. Such seems to me to be the effect of the unreported ruling of this Court (S. A. No 159 of 1876), to which my brother Oldfield was a party. I think I may safely say that such was the law, and the uniform course of decision, before the passing of the Transfer of Property Act; and I have not been able to find any provision in that Act which lays down the contrary rule. S. 74 of the Act enunciates the rule that a subsequent mortgagee possesses the right to pay off a prior mortgage; but such provision cannot be understood to confer upon the prior incumbrancer the power of prohibiting either the mortgagor from dealing with the equity of redemption, or the puisne incumbrancer from enforcing his security, subject, of course, to the rights created by the prior incumbrance. Indeed, s 96 of the Act distinctly contemplates enforcement of puisne incumbrance without paying off the prior incumbrances, for it speaks of the sale of property subject to prior mortgage. Such a sale in enforcement of a puisne incumbrance cannot affect the prior mortgage, and no such conflict of rights can take place as in the case before the Privy Council, where both the contending mortgages included the right of possession, which of course could not be simultaneously enjoyed by both the mortgagees. It seems to me that any other view of the law would necessarily involve

the proposition that the only manner in which a puisne incumbrancer by hypothecation can enforce his security, is to pay off the prior mortgage first, and then to bring the property to sale. It is easily conceivable that such a rule would operate as a great hardship in cases where the value of the prior security is enormously larger than the amount of the puisne incumbrance; whilst in cases where the amount due on the prior mortgage does not become payable till long after the due date of the subsequent mortgage, the puisne incumbrancer would be obliged to wait for his money till the prior mortgage became redeemable. I find much difficulty in holding that the law contemplates such contingencies, and I am of opinion that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security, so long as such enforcement does not clash with the rights secured by the prior mortgage.

Under this view, the appellants as purchasers of the equity of redemption, hold that right, subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the mortgage of 1866 does not place *the equity of redemption* on a better footing, though it entitles them to the benefits of that mortgage, secured to them in the same manner as to the original mortgagee Lachman, whose rights they have acquired by subrogation. In arriving at this view, I have had to consider whether the case of *Gaya Prasad* v. *Salik Prasad* (1) is an authority which binds me to adopt a contrary opinion. Having carefully examined the case, I find that it was not a Full Bench ruling of this Court, but only a reference under s. 575 of the Civil Procedure Code, arising out of a difference of opinion between the learned Judges of the Division Bench (Pearson and Oldfield, JJ.). The case was then heard by Stuart, C. J., and Straight, J., in the absence of the learned Judges who had referred the case,—a procedure which, according to the view expressed by a Bench of three Judges of this Court in the case of *The Rohilkhand and Kumaon Bank* v. *Row* (2), was erroneous. But putting aside this consideration, I find that out of the four judgments that are reported in that case, the judgments of my brothers Oldfield and Straight bear upon the question which I am now considering, whilst the judgment of

(1) I. L. R., 3 All 682. (2) I. L. R., 6 All. 463.

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Pearson, J., proceeds upon a totally different ground, and the judgment of Stuart, C. J., is silent upon the point. Under these circumstances, I do not feel myself bound by that ruling upon the point immediately before me, namely, whether the purchaser of equity of redemption, who pays off a prior mortgage, can, by reason of acquiring the benefits of that mortgage, prevent the property from being brought to sale in enforcement of a mortgage which is anterior to the purchase, but subsequent to the mortgage paid off Before leaving this question, however, I must refer again to some of the cases which I have already cited. The report of the case of *Ram v. Naikan* (1) is not very clear upon this point, but I may take it, that it laid down the rule "that a subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the first mortgage." This is the *dictum* of Deruburg, cited and adopted by Mr. Justice Holloway in that case; and the effect of the last part of Mr. Justice West's judgment in the case of *Mulchand Kuber* (2) seems to be the same. With nearly the whole of that judgment I fully concur, and I would not willingly dissent from the conclusion of such eminent Judges, even upon the point now under consideration, were it possible for me to hold that the right of a prior incumbrancer enables him to suspend the enforcement of the puisne incumbrance by hypothecation, and that redemption of the former is a condition precedent to the enforcement of the latter; and so long as I cannot hold this, I find myself unable to hold that the doctrine of subrogation can enable the party who benefits by it to hold rights which the prior incumbrancer to whom he is subrogated himself never held. I have carefully studied, and, I may say with great advantage, the judgments of Mr. Justice Holloway and Mr. Justice West, both of whom I esteem as eminent Judges and great jurists, but (I say this with profound respect) neither of those judgments contain any exposition of the law upon the exact point on which I have ventured to differ from them, and no other authorities have been cited which sufficiently satisfy me to arrive at any conclusion other than that at which I have arrived. In all the cases to which I have been referred, the exact point seems to have been assumed or taken for granted as a necessary corollary to the doctrine of

(1) 7 Mad. H. C. Rep., 229. (2) 11 Bom. H. C. Rep., 41.

subrogation, which prevents extinguishment of the prior mortgage.

If the case had been decided on the merits by the lower appellate Court, the result of my opinion would be to uphold the decree of the lower appellate Court, directing sale in enforcement of the plaintiff's mortgage of 1874, but to render such sale subject to the mortgage of 1866, to the benefits of which the appellants are entitled. I do not think the case can be decided finally here, because the Subordinate Judge had before him a contention as to the genuineness of the mortgage of 1866, and other pleas touching the merits, which he declined to consider, on account of the erroneous view he took relative to the extinguishmen of the mortgage of 1866. Those were pleas which can be disposed of only by the Court of first appeal, and I would therefore, with reference to the observations which I have made, decree this appeal, and, setting aside the decree of the lower appellate Court, remained the case to that Court for disposal. Costs to abide the result.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

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March 19.

JANKI PRASAD (DEFENDANT) *v.* SRI MATRA MAUTANGUI DEBIA (PLAINTIFF)

Mortgage—First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property—Registered and unregistered instruments—Optional and compulsory registration—Act. III of 1877 (*Registration Act*), *s.* 50.

At a sale in execution of a decree, *J* purchased certain property which was at that time subject to two mortgages, the first under an unregistered deed in favour of *M* and dated in 1872, and the seccond under a registered deed in favour of *L* and dated in 1880. The registration of the latter both deeds was optional, the former under Act VIII of 1871, and the latter under Act III of 1877. *J* subsequently satisfied the mortgage under the registered deed of 1880, which was delivered to him. *M* then brought a suit to recover the money due to him under the mortgage-deed of 1872 by sale of the mortgaged property.

Held by OLDFIELD, J., that applying the rule laid dowu by the Privy Council in *Gokuldas Gopaldas* v. *Puranmal Premsukhdas* (1), *J*, having paid off the mortgage under the registered deed of 1880, should have the benefits of that mortgage,

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* Second Appeal No. 1665 of 1883, from a decree of Maulvi Muhammad Samiullah Khan, Subordinate Judge of Aligarh, dated the 14th August, 1883, modifying a decree of Lala Mata Prasad, Munsif of Aligarh, dated he 7th April, 1883.

(1) I. L. R., 10 Calc. 1035 ; L. R., 11 Ind. Ap. 126.

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and was entitled to set up the deed which he held against the unregistered deed of 1872, against which, under s 50 of the Registration Act (III of 1877) it would take effect, as regards the property comprised in it. *Lachman Das* v. *Dip Chand* (1) referred to.

Per MAHMOOD, J., that the word "unregistered" in s. 50 of the Registration Act, must, in reference to the circumstances of the present case, be read as "not registered under Act VIII of 1871", and that, so reading the section, the registered mortgage-deed of 1880 was entitled to priority over the unregistered mortgage deed of 1872. *Lachman Das* v. *Dip Chand* (1) and *Sri Ram* v. *Bhagirath Lal* (2) distinguished.

Also *per* MAHMOOD, J., that the position of *J*, by reason of his having paid off the registered mortgage of 1880, could at best be that of an assignee of that mortgage having priority over the mortgage deed on which the plaintiff was suing; that such priority could not enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage of 1880; and that, as a consequence, the sale of the property in enforcement of the mortgage of 1872 should be allowed to take place, but subject to the rights of priority which *J*, had acquired by reason of his having paid off the registered mortgage of 1880. *Sirbadh Rai* v. *Raghunath Prasad* (3) and *Gokaldas Gopaldas* v *Puranmal Premsukhdas* (4) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshi *Sukh Ram* and Babu *Harkishen Das*, for the appellant (defendant).

Babu *Jogindro Nath Chaudhri*, for the respondent (plaintiff).

OLDFIELD, J.—The plaintiff-respondent holds a deed of mortgage, unregistered, dated the 15th February, 1872, executed in his favour by Ungan and others, mortgaging the property in suit.

The mortgagors executed another deed of mortgage, dated the 18th December, 1880, which was registered, in respect of the same property, in favour of Sundar Lal; and they also executed a third unregistered deed of mortgage in respect of the same property, on the 26th July, 1881, in favour of Sundar Lal. Sundar Lal obtained a decree on the 6th February, 1882, upon the last deed, for sale of the property mortgaged, had it attached, and sold in execution, and it was purchased by the defendant Janki Prasad, appellant, before us. Janki Prasad subsequently satisfied

(1) I. L. R., 2 All. 851
(2) I. L. R., 4 All. 227.
(3) Supra. p. 568.
(4) I. L. R., 10 Calc 1035; L. R., 11 Ind. Ap. 126.

the mortgage under the registered deed of the 18th December, 1880, which was delivered to him. The plaintiff-respondent has brought this suit to recover the money due to him on the mortgage-deed, dated the 15th February, 1872, by sale of the mortgaged property. He made Ungan the mortgagor, and Janki Prasad the purchaser of the property, defendants in the suit. We are only concerned in this appeal with the claim against Janki Prasad. The material plea that Janki Prasad set up was, that he had satisfied the mortgage-debt under the registered deed dated the 18th December, 1880, and he contended that this document, being registered, will take effect as regards the property comprised in it against the unregistered deed of the plaintiff, and in consequence the latter cannot bring the property to sale in satisfaction of his claim under his deed of mortgage.

The Court of first instance allowed the plea and dismissed the suit. The Subordinate Judge has disallowed the plea, and given a decree for the sale of the property. Janki Prasad, defendant, has appealed, and the grounds of appeal are, in my opinion, valid. It is now settled law by the decision of the Privy Council in *Gokaldas, Gopaldas* v. *Puranmal Premsukhdas* (1), that when a person purchases the equity of redemption and holds a prior mortgage of his own, or pays off a mortgage on the property, there is in neither case of necessity an extinguishment of the mortgage, and, if he so intends, it will be kept alive for his benefit, and in the absence of express evidence, such intention will be assumed if it be for his interest to keep it alive. Applying the rule to the case before us, the appellant will have the benefit of the mortgage under the registered deed dated the 18th December, 1880, and he is entitled to set up the deed which he holds against the unregistered deed of the plaintiff, and it will, under the provisions of s. 50, Registration Act, take effect against the plaintiff's deed as regards the property comprised in it—*Lachman Das* v. *Dip Chand* (2)—and the plaintiff's claim to bring such property to sale to satisfy his mortgage-debt must be disallowed. I would modify the decree of the Subordinate Judge and affirm that of the Court of first instance, which dismissed the suit, with all costs.

(1) I. L. R., 10 Calc. 1035; L. R., 11 Ind. Ap. 126.

(2) I. L. R., 2 All. 851.

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JANKI PRASAD v. SRI MATRA MAUTANGJI DEBIA.

MAHMOOD, J.—The facts of the case, so far as they are necessary for the disposal of this appeal, are, that the property to which the suit relates was hypothecated to the plaintiff under an unregistered deed dated the 15th February, 1872. The same property was, for the second time, hypothecated to one Sundar Lal, under a registered deed dated the 18th December, 1880, and it was hypothecated for the third time to the said Sundar Lal under an unregistered deed of the 26th July, 1881.

It appears that Sundar Lal sued on the bond of the 26th July, 1881, and obtained a decree on the 6th February, 1882, and, in execution of that decree, the defendant purchased that property at the auction-sale, at which Sundar Lal's mortgage of the 18th December, 1880, was duly notified. The defendant subsequently paid off that mortgage and is now in possession. The present suit was instituted by the plaintiff for recovery of the money due on the bond of the 15th February, 1872, by enforcement of lien against the hypothecated property. The Munsif dismissed the suit on the ground that the defendant-purchaser, having paid off the registered mortgage of 1880, was entitled to the benefits of that mortgage, and that the deed, being registered, took (under s. 50 of Act III of 1877) priority over the plaintiff's deed of the 15th February, 1872, and the property could not therefore be sold in enforcement of the plaintiff's incumbrance. On appeal by the plaintiff, the lower appellate Court held that the defendant, having purchased the property in enforcement of the unregistered mortgage of the 26th July, 1881, purchased it subject to the plaintiff's unregistered prior incumbrance of the 15th February, 1872, and that the fact of his having paid off Sundar Lal's registered mortgage of the 18th December, 1880, could not save the property from being sold in enforcement of the plaintiff's lien. The present second appeal has been preferred by the defendant, and the argument addressed to us on his behalf raises two questions for determination.

First.—Did Sundar Lal's registered mortgage of the 18th December, 1880, possess priority over the plaintiff's unregistered mortgage of the 15th February, 1872, on which it is based?

Secondly.—What is the effect of the defendants's paying off Sundar Lal's mortgage upon the relief prayed for in the suit?

In considering the first question, it is important to notice that the plaintiff's unregistered mortgage of 1872 was executed when the registration law was regulated by Act VIII of 1871, under which the registration of the deed was optional, the amount of the mortgage being less than Rs. 100. For similar reasons Sundar Lal's registered mortgage of the 18th December, 1880, did not compulsorily require registration under the present Registration Act (III of 1877). The registration of both deeds being thus optional, and one of them being registered, the question arises, whether the registered deed has priority notwithstanding the fact that the plaintiff's mortgage is anterior in date. In connection with this question, we have been referred to two Full Bench rulings of this Court—*Lachman Das* v. *Dip Chand* (1) and *Sri Ram* v. *Bhagirath Lal* (2)—neither of which appears to me to be on all fours with the present case. In the case of *Lachman Das* the contention was between a document *optionally* registered under Act VIII of 1871 and a document *compulsorily* registered under Act III of 1877 ; whilst in the case of *Sri Ram* both the contending documents were executed before the passing of the present Registration Act III of 1877. Here the contention lies between two *optionally* registrable documents, one of which was optionally registrable under Act VIII of 1871, which was then in force, and the other was registered under Act III of 1877, and the question therefore rests upon the interpretati on of s. 50 of the latter enactment. Reading that section with the last part of the *Explanation* attached to it, it is obvious that the word "*unregistered*," which occurs in the body of the section, must, with reference to the exigencies of the present case, be read as "*not registered under Act VIII of* 1871;" and reading the section in this manner, I have no doubt that Sundar Lal's registered mortgage-deed of the 18th December, 1880, will take effect in preference to the plaintiff's unregistered mortgage of the 15th February, 1872, that is, will have priority.

Upon the second question in the case, I am of opinion that the defendant, as purchaser of the equity of redemption, who has paid off the registered mortgage of 1880, is entitled to the benefits of that mortgage, and can use them as a shield against any

(1) I. L. R., 2 All. 851. (2) I. L. R., 4 All. 227.

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such claim by the plaintiff as would militate against the rights secured by that mortgage. But whether those benefits are such as go beyond the terms and incidents of the mortgage itself, and entitle the defendant to resist the plaintiff's suit to bring the property to sale in enforcement of his mortgage, is another question. The fact of the mortgage of 1880 being registered can only give it priority over the plaintiff's mortgage, and the benefits of priority are available to the defendant who has satisfied that mortgage. But does such priority place the defendant's rights *qua* purchaser of the equity of redemption on a higher footing than they would otherwise have been? In other words, is the defendant entitled to prevent the property from being sold in enforcement of the plaintiff's mortgage? A similar question arose in the case of *Sirbadh Rai* v. *Raghunath Prasad* (1) in which I have explained my reasons for dissenting from the affirmative answer, and have endeavoured to show that the ruling of the Privy Council in the case of *Gokaldas Gopaldas* (2) does not go the length of supplying such an answer.

Taking the same view in the present case, I hold that the position of the defendant, by reason of his having paid off the registered mortgage of 1880, can at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff is suing, that such priority cannot enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage, and that, as a consequence, the sale of the property in enforcement of the plaintiff's incumbrance of 1872 should be allowed to take place, but subject to the rights of priority which the defendant-appellant has acquired by reason of his paying off the registered mortgage of 1880. I would therefore partially decree the appeal, and modify the decree of the lower appellate Court to the extent above indicated, and under the circumstances would make no order as to costs.

(1) *Supra*, p. (2) I. L. R., 10 Calc. 1035; L. R., 11 Ind. Ap. 126.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

1885
March 23.

MAN KUAR (PLAINTIFF) *v.* TARA SINGH AND OTHERS (DEFENDANTS) *

Sale in execution of decree—Sale set aside on objection by third person—Suit to have sale confirmed—Declaratory decree—Civil Procedure Code, ss. 244, 278, 283, 311—*Act I of* 1877 (*Specific Relief Act*), *s.* 42.

Held that persons other than the decree-holders or the persons whose property was sold in execution of decree were not competent to apply to the Court, under s. 311 of the Civil Procedure Code, to set aside the sale.

M in whose name property had been purchased at an execution-sale which was improperly set aside, brought a suit to have the order setting aside the sale reversed, and the sale confirmed in her favour, and for a declaration that the property was not liable to be sold in execution of a decree of the defendants against third persons, under which it had been attached and advertised for sale.

Held that such a suit could only be maintained under s. 42 of the Specific Relief Act (I of 1877), but that s. 244 of the Civil Procedure Code indicated the intention of the Legislature that such questions should be determined in the execution department, and, reading together the provisions of ss. 244, 278, and 283 of the Code, the suit was premature and therefore not maintainable.

THE facts which gave rise to this suit were as follow:—The share in a certain village of certain persons called Bhola Nath and Sham Sundar was put up for sale in execution of a decree held against them by one Kanhaiya Lal, and was purchased in the name of their mother, Man Kuar, the plaintiff in this suit. The defendants in this suit, Tara Singh and Bhajan Singh, who held a decree against Bhola Nath and Sham Sundar, applied to have the sale set aside on the ground that the property had been fraudulently and collusively purchased by Bhola Nath and Sham Sundar, in their mother's name, after the sale had been irregularly published, in order to defeat their (defendants') decree. The Court executing the decree, in execution of which the property had been sold, allowed the application and set aside the sale. After this, the defendants caused the property to be attached and advertised for sale in execution of their decree as the property of Bhola Nath and Sham Sundar. Thereupon Man Kuar brought the present suit against them, in which she claimed to have the order setting aside the sale set aside, and the sale confirmed in her favour, and to have it declared that the property was not

* Second Appeal No. 494 of 1884, from a decree of A. F. Millet, Esq., District Judge of Sháhjahánpur, dated the 21st August, 1883, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Sháhjahánpur, dated the 11th June, 1883.

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liable to be sold in execution of the decree of the defendants against Bhola Nath and Sham Sundar.

The Court of first instance held that, although the defendants were not competent to object to the sale under s. 311 of the Civil Procedure Code, yet in a suit to have the sale confirmed they were entitled to object to it; and that there had been material irregularity in the publication of the sale, and therefore the sale was invalid. It therefore dismissed the plaintiff's suit. This decree, on appeal by the plaintiff, was affirmed by the lower appellate Court.

In this second appeal, the plaintiff contended that the defendants were not competent to object to the sale, and the order setting it aside was made *ultra vires*, and should be set aside.

Pandit *Ajudhia Nath*, and Babu *Ratan Chand*, for the appellant.

Pandit *Bishambar Nath*, for the respondents.

PETHERAM, C. J., and BRODHURST, J.—We think that the appeal must be allowed on both grounds. The facts of the case are somewhat complicated, but when one comes to look at them, they appear to be as follows:—A decree was obtained by one Kanhaiya Lal against four persons, who may, for the purposes of this decision, be styled defendants *A* and *B* and defendants *C* and *D*. *A* and *B* were owners of one property and *C* and *D* were owners of another property. Both properties were attached and put up to sale; but as the two properties were distinct and situated in different places, they were put up to sale in two separate lots. The property of *A* and *B* was sold and purchased ostensibly by the uncle for the mother of *A* and *B*. For the purposes of deciding this point, and for this purpose only, I assume that the property was purchased by the mother by the money of *A* and *B*; that *A* and *B* found the money; and that the mother was the trustee for *A* and *B* in respect of this property. Upon the application of *C* and *D* impeaching the sale on the ground that the property was really purchased by *A* and *B* fraudulently and in collusion, the Court set aside the sale under s. 311, Civil Procedure Code. The first question then is, whether the order setting aside the sale on the objections of *C* and *D* is correct? Whether the order setting

aside the sale was just or unjust is beside the question. The question is, could *C* and *D* object under s. 311 to the validity of the sale of the property of *A* and *B*, and had the Court jurisdiction to set aside the sale on the application of *C* and *D*? Now *C* and *D* were neither the decree-holders nor the persons whose property was sold, and we do not see how they could apply under s 311 to set aside the sale. We think the order setting aside the sale was without jurisdiction and inva lid, and it must be reversed. The other question is, whether in this suit, brought by the mother on the allegations that this sale was improperly set aside, and that *C* and *D* have attached this property on the allegation that it was the property of *A* and *B*, their debtors (her two sons), she could contest the validity of the execution-proceedings taken by *C* and *D* on the allegation that the property was hers. It may be that she has a right to bring the suit, but the question is whether at present it is maintainable at all? If it is maintainable at all, it must be under s. 42 of Act I of 1877. To maintain such a suit, the plaintiff must allege that she is entitled to a legal character and right, and that *C* and *D* are interested in denying her right. Looking at s. 42 of Act I of 1877 alone, it may be said with considerable force that such a suit is maintainable. But if we look at s. 244 of the Civil Procedure Code, it indicates the intention of the framers of the Code that such questions should be determined in the execution department. S. 278 of the same Code provides a machinery for contesting the validity of execution-proceedings, and s. 283 again provides the machinery by which a regular suit is brought to contest the validity of the order passed in the execution department. Reading all these sections together, we do not think the suit is maintainable, and the proper mode for contesting the validity of the execution-proceedings is the one indicated by the Procedure Code. The suit is premature, and upon that ground and no other we dismiss the suit. The appeal is allowed in respect to the first claim. The second claim will be dismissed on the ground that it is premature. Under the circumstances of the case the appeal is allowed, but without costs.

Appeal allowed.

1885
April 1.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Mahmood.

HARPAL SINGH (DEFENDANT) *v.* BAL GOBIND AND ANOTHER (PLAINTIFFS.)*

Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 8—*Act X of* 1859, *s.* 6—*Mortgage—Occupancy-tenure—Sír-land.*

Where land, originally the sír of a proprietor, has been transferred to a mortgagee, and has in his hands lost its character of sír, and has been leased to a tenant on the usual conditions of a tenancy, which otherwise do not bar the acquisition of a right of occupancy in the land, such a right will be acquired by twelve years' occupancy under s. 8 of the Rent Act.

In 1846, *B* mortgaged a share in a village, together with certain land which was recorded as his sír, and which was so described in the deed of mortgage. After the mortgage, it ceased to be recorded as his sír, and was recorded as land held by tenants in the same way as other lands in the estate. In 1857 it was leased to *S*, and in 1863 to *H*, and from 1863 to 1882 remained in the possession of the last-mentioned lessee. In 1882 *B* redeemed the mortgage, and subsequently brought a suit against *H* to establish that the land was his sír, and for possession of it.

Held by the Full Bench that there being nothing in the terms of the mortgage-deed to indicate that the land was transferred to the mortgagee to be held as sír, and the land having ceased to be recorded as the sír of the proprietor, and not having been leased as the sír of the lessor, it had not retained its character as sír when the defendant's tenancy commenced, so as to prevent him from acquiring a right of occupancy therein under the provisions of s. 8 of the Rent Act.

Per MAHMOOD, J., that there is nothing in the law to prevent a zamindar from relinquishing his rights in sír-land and converting it into land held by ordinary tenants; that the mortgage-deed of 1846 showed that the sír right in the land in suit had been relinquished by the mortgagor; and that the sír land once relinquished by the zamindar ceases to have that character, and cannot prevent the accrual of the occupancy-right within the meaning either of s. 6 of Act X of 1859 or of s. 8 of Act XII of 1881.

The right of occupancy conferred by the Legislature upon cultivators of more than twelve years' standing is a right wholly independent of the wishes either of the zamindar or his mortgagee in possession, and when a cultivator acquires such a right, it cannot be taken as in the nature of a grant from either of them. The right of occupancy may thus be acquired during the currency of a usufructuary mortgage and during the period of the mortgagee's possession of the zamindari rights, and the zamindar upon redeeming the mortgage cannot

* Second Appeal No. 132 of 1884, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 24th November, 1883, affirming a decree of Shah Ahmad-ul-lah, Munsif of Benares, dated the 7th April, 1883.

disturb the possession of such occupancy-tenants on the ground that, when he mortgaged the zamindari, it was free of such occupancy-tenures *Heeroo* v. *Dhoree* (1) referred to.

THE plaintiff in this case, a shareholder in a village called Dadupur, claimed certain land situate in that village as his sír land. It appeared that in 1841 the land in suit was recorded as plaintiff's sír. On the 23rd May, 1846, the plaintiff's share was usufructuarily mortgaged on his behalf by Lachminia, his mother, to one Dhan Singh, for Rs. 300. This sum it appeared was due to Dhan Singh under a *zar-i peshgi* lease, under which he was in possession of the share. The deed of mortgage, after reciting that the sum of Rs. 300 was due to the mortgagee and that he was pressing for payment, continued as follows:—

"I have accordingly, in lieu of the said Rs. 300, made a usufructuary mortgage of the one-fourth share aforesaid, which was already in the possession of the said mahájan under a lease; and the 30 bighas of fields, sír and sair items, which are in my possession, I have also put into the said mahajan's possession. But I have retained in my possession for my support only 10 bighas (kham) of fields, agreeing to pay revenue at one rupee per bigha, and I therefore agree and covenant that the said mahájan shall remain in entry and possession of the said share together with sír lands and sair items, and after paying the Government revenue and village expenses, as detailed above, he may take the remainder in interest. I shall repay the principal sum of Rs. 300 in the space of ten years, and if within this period I do not repay this sum, the said mahájan is at liberty to continue as heretofore in possession under this document. Neither I nor my heirs shall make any kind of deviation from the foregoing stipulations; if we do, it will be invalid, and accordingly this usufructuary deed of mortgage has been executed, that it may be of use in time of need."

The land in suit was, it was alleged, a portion of the 30 bighas described as sír in the deed of mortgage. In 1857 the land in suit was in the possession of one Sukal, having been let to him by the mortgagee. In 1863 it was let by the mortgagee to Harpal Singh, defendant in this suit, and remained in his possession from that year. In 1882 the plaintiff redeemed the mortgage, and

(1) N.-W. P. H. C. Rep., 1870, p. 129.

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subsequently brought the present suit against Harpal Singh to establish that the land was his sír, and for possession of it. The defendant set up as a defence to the suit that he had been in continuous occupation for more than twelve years, and had acquired a right of occupancy, under s. 8 of the N.-W. P. Rent Act, 1881. Both the lower Courts, regarding the land as sír when it was mortgaged, and when it was let to the defendant, held that the defendant could not acquire a right of occupancy in it.

The defendant appealed to the High Court.

The Divisional Bench (PETHERAM, C. J. and MAHMOOD, J.) hearing the appeal referred the following question to the Full Bench:—

"Under the circumstances of this case, did Harpal, appellant, acquire an occupancy-tenure within the meaning of s. 8 of the Rent Act, or did the land remain as sír, so as to prelude the creation therein of an occupancy-tenure?"

For the purposes of this reference it was assumed that the land was the sír of the mortgagor at the time the mortgage was made and was the subject of the mortgage.

Munshi *Kashi Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J., and STRAIGHT, OLDFIELD, and BRODHURST, JJ.—It has been found that Harpal was put into occupation of this land in 1863 as a tenant by Dhan Singh, who was the mortgagee under the deed of the 23rd May, 1846, and the question is whether this land was sír when Harpal's tenancy commenced; for if it was, no right of occupancy can be acquired by him in respect of it, whether we look to the law which was in force when his tenancy began, in s. 6, Act X of 1859, or to the present law, s. 8 of the Rent Act.

Now, although the mortgagor held this land as his sír at the time he transferred it in mortgage, there is nothing in the terms of the mortgage-deed of the 23rd May, 1846, to indicate that he transferred it to the mortgagee to be held as sír. It passed out

of his own control, and was no longer held by him as sír; and whether or not he intended that the mortgagee should hold it as sír, it is clear that, as a matter of fact, the mortgagee did not treat the land as sír. It ceased to be recorded as the sír of the proprietor, as had hitherto been the case, and was recorded as land held by tenants in the same way as other lands in the estate held by tenants on which a right of occupancy might be acquired, and it had been let to one Sukul Ahir in 1857 before it was let to Harpal in 1863, and not leased to them as the sír of the lessor. There is nothing in fact to show that this land retained the character of sír-land at the time it was leased to Harpal. Under such circumstances, where land, originally the sír of a proprietor, has been transferred to a mortgagee in mortgage, and has in his hands lost its character of sír and been leased to a tenant on the usual conditions of a tenancy, which otherwise do not bar the acquisition of a right of occupancy in the land, such a right will be acquired by twelve years' occupancy under s. 8, Rent Act.

The answer to the reference will be that Harpal acquired a right of occupancy in the land.

MAHMOOD, J.—I am of the same opinion, but wish to add a few observations. There is nothing in the law to prevent a zamíndár from relinquishing his rights in sír-land and converting it into land held by ordinary tenants. In this case the mortgage-deed of 1846 clearly shows that the sír right in 30 bighas including the land now in suit had been relinquished by the mortgagor who held these rights. The land was taken possession of by the mortgagee, who appears to have let it to tenants, the last of whom is Harpal (defendant-appellant), whose tenancy admittedly began in 1863. He has ever since been in possession as cultivator, and the question arises whether, even conceding that the land was originally the plaintiff's sír, the defendant has acquired the right of occupancy. I hold that the sír-land once relinquished by the zamíndár ceases to have that character, and cannot prevent the accrual of the occupancy-right within the meaning either of s. 6 of the old Rent Act (X of 1859) or of s. 8 of the present Rent Act. The right of occupancy conferred by the Legislature upon cultivators of more than twelve years' standing is a right wholly

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independent of the wishes either of the zamíndár or of his mortgagee in possession, and when a cultivator acquires such a right, it cannot be taken as in the nature of a grant from either of them.

The right of occupancy may thus be acquired during the currency of a usufructuary mortgage and during the period of the mortgagee's possession of the zamíndári rights, and the zamíndár upon redeeming the mortgage cannot disturb the possession of such occupancy-tenants on the ground that, when he mortgaged the zamíndári, it was free of such occupancy-tenures. Such was the rule laid down by Turner, Offg. C. J., and Ross and Spankie, JJ., in *Heeroo* v. *Dhoree* (1), and agreeing in the view therein taken, I hold that it is applicable to the present case.

1885 *January* 9.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Mahmood.

SHEO DAYAL MAL AND ANOTHER (DEFENDANTS) *v.* HARI RAM AND ANOTER (PLAINTIFFS).*

Registration, place of—Act VIII of 1871 *(Registration Act), ss.* 28, 85—*"Whole or some portion of the property"—Bona fide transferee for value of mortgaged property—Notice—Ignorance of existing incumbrance.*

The terms of s. 28 of Act VIII of 1871 must not be construed in their literal sense, inasmuch as to do so would defeat the intention of the Legislature that registration should be made with reference to the locality of the property to which the document relates; and hence the words of the section "some portion of the property" must be read as meaning some *substantial* portion.

A bond which purported to mortgage 500 square yards of land situate at *P*, two entire villages and shares in fourteen villages in the *G* district, and a village in the *C* district, and which required registration under Act VIII of 1871, was registered at *P*.

Held that the bond was not properly registered in accordance with the provisions of s. 28 of Act VIII of 1871.

Per MAHMOOD, J.—The imperative direction of s. 28 of Act VIII of 1871 is addressed not to the registering officer, but to the person presenting a document to that officer for registration; and therefore s. 85, which refers only to defects in the appointment or procedure of the registering officer, could not cure the irregularity which was committed under s. 28.

Held that a statement in answer to interrogatories, which was made by the purchaser of mortgaged property, to the effect that, at the time of the purchase, he was aware of the mortgage and believed that it had been satisfied, was no

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* First Appeal No. 26 of 1882, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 7th November, 1881.

(1) N.-W. P. H. C. Rep., 1879, p. 129.

proof of the purchase having been made after notice of a prior mortgage, inasmuch as it was inconsistent with the knowledge of an *existing* incumbrance.

THE suit to which this appeal related was one for the recovery of Rs. 79,655 principal and interest due on a bond dated the 20th May, 1873, and for the sale of the property mortgaged therein. It was instituted in the Gorakhpur district. This bond had been given to the plaintiffs by the defendant Brooke, and he had subsequently to its date transferred by sale to the other defendants, Sheo Dayal and Har Dayal, the property mortgaged by it to the plaintiffs. The bond purported to mortgage 500 square yards of land in Muhalla Mughalpura in the city of Patna, two entire villages and shares in fourteen villages in the Gorakhpur district, and a village in the Champaran district. The defendants Sheo Dayal and Har Dayal defended the suit upon the ground, amongst others, that the bond was not admissible in evidence, not having been registered in accordance with the provisions of s. 28 of Act IX of 1871, under which it had been registered, inasmuch as it had been registered at Patna, where the defendant Brooke had not any property at the time of registration, the recital in the bond as to the 500 square yards of land in Muhalla Mugalpura being false. With reference to this defence, the lower Court framed the following issue:—"Had Mr. Brooke any immoveable property in Patna, the 500 yards of land in Muhalla Mugalpura to wit, so that the legality of the registration of the bond, dated the 20th May, 1873, is indisputable; and, if Mr. Brooke had not such land, is the registration of the deed in Patna valid or not, and the deed admissible in evidence?" Upon this issue, the lower Court found that the defendant was the owner of land in Patna at the time of the registration of the bond, and held that the registration of the bond at Patna was consequently in accordance with the provisions of s. 28 of Act VIII of 1871.

The first question raised by this appeal by the defendants Sheo Dayal and Har Dayal from the decree which the lower Court gave the plaintiffs was whether the registration of the bond at Patna was in accordance with law.

Mr. *C. H. Hill*, Mr. *T. Conlan*, and Babu *Dwarka Nath Banarji*, for the appellants.

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SHEO DAYAL MAL v. HARI RAM.

Pandit *Ajudhia Nath*, Lala *Lalta Prasad*, and Babu *Baroda Prasad Ghose*, for the respondents.

For the appellants it was contended that the defendant Brooke possessed no property whatever at Patna at the time of registration of the bond; and further that, assuming that the defendant Brooke possessed at the time of registration of the bond the land at Patna which it purported to mortgage, the bond had not been registered in accordance with the provisions of s 28 of Act IX of 1871, as the true intent and meaning of that section was that the instrument shall be registered in the district in which the substantial part of the property is situated, and, regard being had to the relative value and extent of such land, and of the mortgaged property situate in the Gorakhpur district, such land was not a "substantial" portion of the property to which the bond related.

For the respondents it was contended that the finding of the lower Court that the defendant Brooke possessed the land at Patna described in the bond was correct, that s. 28 must be construed as it stood, and the word "substantial" could not be interpolated; that the bond having been as a matter of fact registered must, there having been no fraud contemplated, be taken to have been duly registered, the registration of an instrument in the wrong district being a defect of the nature contemplated by s. 85, and not such a defect as would invalidate the registration. Reference was made to *Ilar Sahai* v. *Chunni Kuar* (1), *Bishunath Naik* v. *Kalliani Bai* (2), *Sah Mukhun Lal Panday* v. *Sah Kundan Lal* (3), and *Muhammad Ewaz* v. *Birj Lal* (4).

It was also contended, on the one side, that the respondents had purchased from the defendant Brooke with notice of the mortgage to the plaintiffs, and, on the other, that they had not purchased with such notice.

PETHERAM, C.J.—I think that this appeal must be allowed on the ground that the deed executed by Mr. Brooke, on the 20th May, 1873, was invalid as against subsequent purchasers by reason of not being properly registered. I take the facts which are necessary for the purposes of this judgment, to be

(1) I. L. R., 4 All 14.
(2) Weekly Notes, 1882, p 175.
(3) 15 B. L R 228, 24 W. R. 75, L. R, 2 Ind. Ap 210
(4) I. L. R, 1 All 465, L R., 4 Ind. Ap. 166.

the following :—Mr. Brooke is the owner of valuable property at Gorakhpur and also at Champaran, each of which places is at a considerable distance from Patna, and he had also at Patna a property which is assumed to be worth about Rs. 500, but which was, in all probability, worth less than that amount, and which, at all events, bore a very small proportion to the whole property belonging to Mr. Brooke, and mortgaged by the deed of the 20th May, 1873. Under these circumstances, the bond in question was registered at Patna. Now, the first question which arises in this appeal is, whether it was sufficiently registered with reference to the provisions of s. 28 of Act VIII of 1871, which contained the registration law in force at the time when the bond was executed. That section provides that "every document mentioned in s. 18, clauses (1), (2), (3), and (4), and s. 17, clauses (1), (2), (3), and (4), shall be presented for registration in the office of a Sub-Registrar, within whose Sub-District the whole or some portion of the property to which such document relates is situate." The document of the 20th May, 1873, comes under cl. (2) of s. 17, which makes compulsory the registration of "other instruments (not being wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 or upwards, to or in immoveable property." Now, here we have an instrument purporting to create a vested interest in immoveable property of greater value than Rs. 100, and therefore it required registration in the place referred to in s. 28, namely, the office of a Sub-Registrar, within whose Sub-District "the whole or some portion of the property to which" it related was situate. Now, since Mr. Brooke had about Rs. 500 worth of land at Patna, which was hypothecated in the bond, "some portion" of the property to which the bond related was undoubtedly situate in the place of registration. And, therefore, if the words of s. 28 are to be taken in their literal sense, the bond must be regarded as having been properly registered. But it seems to me that to take them literally would be to defeat the real object which the Legislature had in view when it enacted the section. That object was, that the registration of a document should have some reference to the locality of the property to which the document

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relates. The section first speaks of the sub-district in which the *whole* of the property is situate. But in a case like the present in which there is a large and valuable property in one sub-district, and another small piece of land situate at a distance, it seems to me that to allow registration of a document affecting both properties in the place where the smaller and less valuable is situate, would be inconsistent with the implied intention of the Legislature, that registration should be made with reference to the locality of the property.

What, then, is the rule to be followed in cases where a literal interpretation of the terms of an enactment would defeat the intention with which the enactment was made? Mr. Wilberforce in his book on *Statute Law* (1881) has expressed the rule in clear language, and has collected the cases by which it has been established. He says (p. 131):—"It has often been laid down that while words are to be understood in their plain and ordinary sense, they must not be read so literally as to defeat the object of an enactment. Acting on this principle, the Courts have both in ancient and modern times given some words a wider meaning than they usually bear, and have restricted or modified the meaning of others." He cites cases which establish this principle, and in some of which the literal meaning has been enlarged, while in others it has been restricted by the Courts. In the case before us we must first consider whether the intention of the Legislature cannot be effected without either enlarging or restricting the meaning of the terms which it has used. For the reasons which I have already given, I do not think that this is possible.

If the words in s. 28 of Act VIII of 1871—"some portion of the property"—are construed to mean some *substantial* portion, then the obvious intention of the Legislature is effected, and registration is kept to the place where a man's property is known to be situate. Now, the property of Mr. Brooke at Patna cannot be regard as a substantial portion of the whole property hypothecated, and therefore I am of opinion that the deed must be considered invalid. Cases were cited to show that an insufficient registration may not absolutely invalidate a deed with reference to s. 49. It is probable that in those cases, the question of registra-

tion arose between the parties to the deed, and if the operation of s. 49 is confined to the case of persons subsequently taking the property, then the decisions referred to are not irreconcilable with the views which I am now expressing. Then comes the question whether the purchaser bought after the mortgage and with notice of it, in which case he would have no *locus standi*. The only evidence as to notice is in one of the defendant's answers to interrogatories, in which he stated that he was aware of the mortgage and believed that it had been satisfied. This statement is inconsistent with the knowledge of an *existing* encumbrance, and therefore is no proof of the purchase having been made after notice of a prior mortgage.

MAHMOOD, J.—I concur in the judgment delivered by the learned Chief Justice, but I wish shortly to express my own views as to the validity of the document upon which the suit is based. The construction placed upon the provisions of s. 28 of Act VIII of 1871 by the learned Chief Justice is, in my opinion, the only construction possible, and if the registration of the deed with which we are now concerned was not in accordance with those provisions so construed, it is undoubtedly invalid under the Registration Law. Much of the argument of the learned pleader for the respondents has turned on the analogy of the interpretation of s. 85 of the same Act, and also on two cases decided by their Lordships of the Privy Council—*Sah Mukhun Lal Panday* v. *Sah Kundan Lal* (1), and *Muhammad Ewaz* v. *Biri Lal* (2). I have carefully examined these cases, and some other authorities also, one being a decision of the Calcutta High Court, in which Broughton, J., gave a judgment which has been followed by this Court. I think that in this case we must distinguish between those matters which are of the essence of the Registration Law and those which are merely subsidiary to the object which the Legislature in making that law had in view. And I take it as an almost universal rule of construction that the words of a statute must be understood in a sense calculated to promote the object with which it was enacted. I interpret the word "shall" in s. 28 of Act VIII of 1871 to imply an absolutely imperative command addressed by

(1) 15 B L. R. 228 ; 24 W. R. 75 ; L. R., 2 Ind. Ap. 210.

(2) I. L R., 1 All. 465 ; L. R, 4 Ind. Ap. 166.

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the Legislature to all persons presenting documents for registration. It is obvious that the insignificant piece of land at Patna was not "some portion" of the hypothecated property, using that expression in the sense in which I believe it to have been used in s. 28. Under that section, therefore, an irregularity was committed, and the question then arises whether or not that irreglarity is condoned by any provision of Act VIII of 1871, or any other Act, or by any principles which ought to be applied in the construction of statutes. The learned pleader for the respondents relied on s. 85 of Act VIII of 1871 :—"Nothing done in good faith pursuant to this Act or any Act hereby repealed by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." Now, the imperative direction of s. 28 is addressed not to the registering officer, but to the person presenting a document to that officer for registration. S. 85, on the other hand, is not addressed to the parties, but relates to the registering officer. I do not think, therefore, that s. 85 can help the respondents' case, especially as that section refers only to defects in the appointment or procedure of the registering officer. Here there is no question of defective appointment, nor, looking to the sections of the Act which appear under the heading of procedure, do I think that any defect of procedure under these sections can be shown. The only remaining question is that of notice to *bonâ fide* transferees for value, which is one of the main objects of the Registration Law. The registration being vitiated by irregularity, as the learned Chief Justice has shown, I am further of opinion that no other notice to the purchaser has been sufficiently proved. I concur, therefore, in decreeing the appeal with costs.

Appeal allowed.

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January 15.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

BRADLEY (DEFENDANT) *v.* ATKINSON (PLAINTIFF.)*

Landlord and tenant—Notice to quit—Act IV of 1882 (*Transfer of Property Act*), *ss.* 106, 111.

On the 11th December 1882, *A*, who had, on the 1st July 1882, let rooms in a dwelling-house to *B*, sent a letter to the tenant in the following terms:—"If the rooms

* Second Appeal No. 8 of 1884, from a decree of F. S. Bullock, Esq., Officiating District Judge of Allahabad, dated the 2nd October, 1883, affirming a decree of Babu Ram Klai Chaudhri, Subordinate Judge of Allahabad, dated the 18th June, 1883.

you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter.

Held by OLDFIELD, J., (MAHMOOD, J., dissenting) that, with reference to the terms of s. 106 of the Transfer of Property Act, the letter was not such a notice to quit as the law required, inasmuch as the notice did not expire with the end of a month of the tenancy; and that this defect was not cured by the circumstance that the lessor waited until the end of the month to enforce his right to eject by suit.

Held by MAHMOOD, J., (OLDFIELD, J, dissenting) that the letter dated the 11th December 1882 was a valid notice to quit under ss. 106 and 111 of the Transfer of Property Act, and sufficient to determine the tenancy, inasmuch as it gave the tenant more than fifteen days' notice, and its terms were such that he could with perfect safety have acted upon it by quitting the premises at the proper time, namely, by the end of the month, which he must be presumed to have known was the right time to leave, without any risk of incurring liability to payment of further rent, the landlord having clearly indicated his intention to terminate the tenancy, and the notice being binding upon him; that the additional time given by the notice must be taken to have been given for the convenience of the tenant, and not with the object of continuing the tenancy; and that the suit for ejectment, not having been brought till long afterwards, was maintainable. *Doe* v. *Smith* (1), *Ahearn* v. *Bellman* (2), *Nocoordass Mullick* v. *Jewraj Baboo* (3), and *Jagut Chander Roy* v. *Rup Chand Chango* (4) referred to.

Also *per* MAHMOOD, J.—The words "fifteen days" in s. 106 of the Transfer of Property Act imply a fixation of the shortest period of notice allowed by the section: and the term "expiring" means that the terms of the notice must be such as to make it capable of expiring according to law at the right time, so as to render it *safe* for the tenant to quit coincidentally with the end of a month of the tenancy, without incurring any liability to payment of rent for any subsequent period.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Mr. *C. H. Hill*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) for the respondent.

OLDFIELD, J.—This is a suit to eject the defendant-appellant from premises let to him by the plaintiff, and to recover rent. The tenancy commenced on the 1st July, 1882. For the purposes of this appeal, the only facts necessary to state are, that on the 11th December, 1882, the plaintiff sent a letter to the defendant, which was in effect, a notice to quit. He wrote that "If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated

(1) 5 Ad. & E. 353.
(2) L. R, 4 Exch Div. 201.
(3) 12 B. L R, 263.
(4) I. L. R., 9 Calc. 48.

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within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate."

This was a notice to quit expiring on the 10th January, 1883, and the present suit, which was instituted on the 1st February, 1883, has been brought with reference to the above notice.

The Courts below have decreed the claim for ejectment and for a portion of the rent claimed.

This appeal on behalf of the defendant refers only to the decree for ejectment, which it is contended could not be made, there having been no valid notice to quit or termination of tenancy.

The law which governs contracts of this kind is s. 106 of the Transfer of Property Act :—" In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy ; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy."

The lease we are dealing with comes under the last part of the section, and is a lease from month to month, and in the absence of a contract or local law or usage to the contrary, is terminable by the lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy.

The notice of the defendant does not fulfil the requirements of the law, as it did not require the tenant to quit at the proper time ; or, in the language of the Act, the notice did not expire with the end of a month of the tenancy. The tenancy commenced on the first of the month, and the end of a month of the tenancy was the last day of a month on which the notice should have expired, whereas it expired on the 10th of the month.

This notice therefore was not such as the law requires, and had not the effect of terminating the tenancy on the 10th January, the day on which it expired ; and it does not help the plaintiff that he wanted until the end of the month to enforce his right to eject by

suit. He cannot in this way cure the defect in the notice. The notice was ineffectual to terminate the tenancy on the day on which it expired, and is not good for the purpose of terminating it on a subsequent date to which the notice had no relation.

The Judge admits that "the law in England is, that the validity of a notice is supported by its being for a period which does not expire with the tenancy;" but adds that he knows of no such law in this country, and that by the custom in this country the only notice recognized is a month's notice without regard to the period of tenancy.

The Judge appears to have overlooked the provisions of s. 106 of the Transfer of Property Act, which is the law on the subject; and there is no evidence on the record by which such a custom as he refers to is established which can override the law.

The appeal is allowed, and I would modify the decrees of the Courts below by disallowing the claim for ejectment. The appellant will have his costs in all Courts.

MAHMOOD, J. – The learned counsel for the appellant has limited his argument to the question of the validity or otherwise of the notice to quit, dated the 11th December, 1882, and I confine my judgment to the same point. The sole question therefore is, whether or not that notice was sufficient in law to determine the tenancy, and to enable the plaintiff to maintain a suit for the ejectment of the defendant. Mr. Hill referred to ss. 106 and 111 of the Transfer of Property Act, the former of which runs thus :—" In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy." The last clause obviously applies to the present case, which is one of a lease for purposes other than those mentioned in the first clause, and therefore, in the absence of a contract or local law or usage to the contrary, we must take the lease to have

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been a lease from month to month, and subject to the provisions contained in the second part of the section which I have just read. Then s. 111 shows how a lease of immoveable property determines, and cl. (*h*) gives the following instance:—"On the expiration of a notice to determine the lease, or to quit, or of intention to quit the property leased, duly given by one party to the other." I here lay stress upon the word "*duly*," and the whole question before us is, whether the notice to quit, dated the 11th December, 1882, was duly given in accordance with the requirements of s. 106.

Before explaining the construction which I place upon that section, I will notice Mr. Hill's argument relating to the English law on this subject. To me it seems that even under the English law (and I say this with regret, because my brother Oldfield differs with me) this notice would be sufficient to determine the lease. In the first place, what is precisely the reason why notice should be necessary before a lease can be ended? Mr. Hill argued very soundly that the relation of landlord and tenant, being the result of a deliberate contract, is subject to the general rule of jurisprudence that no contract can be rescinded except by the mutual consent of the parties to it, or some other rule to which the law has given similar effect. Now, in regard to the contract of a lease between landlord and tenant, the law says that the relation between them may be terminated at the choice of either, subject to certain specified conditions. Notice is absolutely necessary in a case such as this, and that notice, in order to be effectual, must fulfil the requirements of the law. Now, the object of giving tenants notice to quit is, that "as the tenant is to act upon the notice when he receives it, it should be such a notice as he may act upon *safely*, and therefore it must be one which is binding upon all parties concerned at the time it is given, and needs no recognition by any one of them subsequently ..... No particular form of the notice is necessary, but there must be a *reasonable certainty* in the description of the premises, and in the statement of *the time* when the tenant must quit." (Parsons *On Contracts*, Vol. I, p. 514). What this means is, that the terms of the notice must make the matter so clear as to enable the tenant to take action on it *safely*, in the sense of leaving the premises at the proper time without any further liability for rent, because, as Story in his work

On Contract says, in s. 1257, "if the lodgings be kept beyond the term for which they are let, a new term commences, for which the tenant is bound to pay full rent, whether he occupy them during the whole term or not." And because the main object of the notice is to save the tenant from running a risk of incurring such liability, the same learned author in s. 1260 of his work goes on to say.—"The notice must be explicit and positive. It must not give the tenant an option of leaving the premises or entering into a new contract. But it need not be worded with the accuracy of a plea;" and to this observation, relying upon certain cases, he appends a note to the effect that "the notice to be served by the landlord upon the tenant-at-will to determine his tenancy need not specify the time within which the premises must be surrendered. If a time is specified in the notice served upon the tenant, which elapses within less than one month from the time of service of the notice, it will not vitiate the notice. It is sufficient if the tenant has thirty days' notice in writing of the intention of the landlord to terminate the tenancy." Of course this passage is not fully applicable to the present case, because, by reason of the statutory provisions contained in s. 106 of the Transfer of Property Act, the lease here must "be deemed to be a lease from month to month, terminable on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy." The principle, however, which regulates the object of the notice is applicable, because even a tenant from year to year,—to use the words of Mr. Woodfall (p. 204),—"is substantially a tenant at will; except that such will cannot be determined by either party without due notice to quit," and the "notice to quit must be clear and certain, so as to bind the party who gives it, and to enable the party to whom it is given to act upon it at the time when he ought to receive it." (p. 318.) Thus the *object* of the notice to quit, whenever it is required by law to terminate the tenancy, is identical, whether the tenancy be from year to year, or, as in this case, from month to month. In both cases the turning point as to the validity of the notice is, whether it was sufficiently clear to make it safe for the tenant to quit at the proper time without incurring the risk of liability to rent after he has quitted the premises. I am not aware of any rule of law

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which requires the landlord, any more than the tenant, to inform the other of the specific time when such notice would legally terminate the tenancy. Both are by a necessary legal presumption supposed to know the law, and it is obvious that, both being contracting parties to the lease, they must be taken to be aware of the terms of the contract. The principle of the rule is the same as that in the case of *Right* v. *Darby* (1), cited in Addison *On Contracts* (p. 353), where it is laid down that "when a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term." And the same principle prevailed in another case—*Doe* v. *Smith* (2)—cited by the same author (p. 358), where a notice was given to quit "at the expiration of half a year from the delivery of this notice, or at such other time as your present year's holding shall expire after the expiration of half a year from the delivery of this notice," and the notice was given towards the close of the current year. It was held that the word "present," which rendered the notice inaccurate and unmeaning, might be rejected, as there was no *danger* of the tenant having been *misled* by it.

The other English authorities, to be found in Addison *On Contracts* and in Woodfall *On Landlord and Tenant*, go to show that it was formerly held that a notice to quit, which was accompanied by an intimation giving an option to the tenant to continue the tenancy on other terms, was bad in law; but even in the former treatise it is laid down on the authority of *Doe* v. *Wrightman* (3, that when the notice is given in the alternative, in order to hit one of two periods on which the term is known to end, such notice is a perfectly good notice, and possesses all the certainty that is *reasonably* requisite for the information of the tenant. But the latest case is *Ahearn* v. *Bellman* (4), decided by the Court of Appeal, in which the judgment of Brett, L.J., may possibly go to a certain extent to support the reasoning upon which Mr. Hill's argument is based, but the *ratio decidendi* adopted by the majority of the Court—Bramwell and Cotton, L.JJ.,—certainly does not favour the contention pressed upon us on behalf of the appellant. The majority of the Court in that case laid down the

(1) 1 T. R 162
(2) 5 Ad. & E 353.
(3) 4 Esp. 6
(4) L. R, 4 Exch. Div. 201.

principle that a notice to quit which is in itself sufficient to enable the tenant to quit at the proper time without any chance of being liable to payment of any rent for any period subsequent to his quitting the premises, is valid in law to terminate the tenancy. I am of opinion that the same principle applies to this case. Our statute law says that a tenancy, such as the one in this case, could be terminated by giving fifteen days' notice to the landlord—the "notice expiring with the end of a month of the tenancy." Here the notice is dated the 11th December, 1882, so that the tenant had more than fifteen days' notice, and its terms were such that he could have *perfectly safely* acted upon it by quitting the premises at the proper time, namely, by the end of the month, which he must be presumed to have know was the right time to leave without any risk of incurring liability to payment of further rent—the landlord having clearly indicated his intention to terminate the tenancy, and the notice being perfectly binding upon him. It is true that in this case the notice gave the tenant longer time than that required by the law, but such additional time must be taken to have been given for the convenience of the tenant, and not with the object of continuing the tenancy. What the notice meant was:—"I no longer want you as my tenant; the sooner you leave the better, but I give you a month's time to vacate the premises, and if you do not do so, I will sue you for ejectment, but will not do so before the end of the time which I am giving." I fail to see how the notice could have misled the tenant into thinking that any choice was left to him to continue the tenancy, nor am I able to see any reason why a notice to quit, which showed indulgence to the tenant to have longer time than that absolutely required by the law, should vitiate its legal effect. There is nothing in the notice to suggest that the landlord intended to claim rent for any period subsequent to the end of December, and I take the period of a month named therein simply to mean that the landlord would not put the tenant into Court before the lapse of that time. Indeed, the plea urged on behalf of the defendant is at its best based upon an extremely technical ground which I, speaking for myself, would never allow unless it is founded upon substantial grounds of justice, equity, and good conscience, which must guide the

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administration of the rules of law in our Courts. But to what does the whole argument of the appellant amount? Mr. Hill conceded that if the notice to quit had simply required the tenant to quit at the end of the month, it would have been valid; and the question therefore is, whether a notice, which merely desires the tenant to quit within a month (which included the proper period), or accept the alternative of a suit for ejectment, is invalid. I must here point out that the notice did not say that the tenant was to quit at the end of the month, but "*within a month.*" I have carefully considered the cases cited by Mr. Hill, but I do not think that they are on all fours with this case, because in them the notice to quit did not, as here it does, leave any choice to the tenant to leave at the proper time required by law. If this notice had in like manner peremptorily and without any alternative ordered the tenant to leave the premises at an improper period specified in the notice—say the 10th of January next—I should have agreed with Mr. Hill. But it gave a month's time, enabling the tenant to leave at any time during the month in which his tenancy would legally end. I hold that it was a good notice for the purpose of determining the tenancy.

Now, in order to justify this conclusion by the terms of s. 106 of the Transfer of Property Act, I must refer to three important expressions in that section. The first of these is "*terminable,*" and there can be no doubt that the lease in this case is "terminable," meaning by that term capable of being ended. Then the words "fifteen days." I take to imply a fixation of the shortest period of notice allowed by the section. Lastly, what is meant by the term "*expiring*"? I think the meaning is that the terms of the notice must be such as to make it capable of expiring according to law at the right time, so as to render it *safe* for the tenant to quit co-incidentally with the end of the month of the tenancy, without incurring any liability to payment of rent for any subsequent period. The terms of the notice in this case were undoubtedly clear enough to indicate that the defendant was no longer wanted as tenant of the premises, and the expression "*within a month from this date*" certainly cannot convey the meaning either that the landlord intended to continue the tenancy, or that the tenant was in any manner precluded from acting in

accordance with the behests of law by quitting the premises at the end of the month. Indeed, the notice threatened the defendant with an action for ejectment if he did not vacate the premises "within a month;" and though the expression included some days of the month of January, the effect was simply to give time to the defendant to vacate the premises, and if such time exceeded the limits of the legal length of the notice, it certainly did not place the tenant at a disadvantage, nor convey any intention on the part of the landlord to give the tenant the option of continuing the tenancy after the end of December, which was the legal limit of the notice. Confining myself to the limited scope of the case as argued before us, the test of the matter seems to be: how has the defendant Bradley been aggrieved by the terms of the notice? Was it so ambiguous as to preclude him from quitting at the end of December, or to render him liable for payment of rent for subsequent period if he did quit the premises at that time? I think the case of *Doe* v. *Smith* (1), which I have already cited, was even a stronger case than the present, and I should say here, as was said there, that the notice left no danger to the tenant of being misled by its terms, so as to subject him to the liability of payment of rent if he quitted at the right time required by the law to terminate the tenancy. The law does not require one party to explain its principles to the other, and the rule as to giving notice to quit cannot be administered regardless of the reason upon which it is based.

In conclusion I wish to refer to two cases which were cited at the hearing—*Nocoordass Mullick* v. *Jewraj Baboo* (2) and *Jagut Chunder Roy* v. *Rup Chand Chango* (3). Both of these cases were decided before the Transfer of Property Act came into force, and are therefore no authorities governing this case. But if any matter of principle is to be evolved from them, both of them would go to support my view, because in the former case the terms of notice left it open to the tenant to leave the premises before or at the end of the month—the length of the notice being of course now modified by s. 106 of the Transfer of Property Act. The rule laid down in the latter case has of course been similarly modified, but if the *ratio decidendi* may be taken to lay down any

(1) 5 Ad. & E. 353. (2) 12 B. L. R., 263.
(3) I. L. R., 9 Calc. 48.

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matter of principle applicable to this case, the tendency of the ruling is to support the view adopted by me in this case.

Under the circumstances of this case, and regarding it in the limited manner in which it has been argued before us, I am of opinion that the notice, dated the 11th December, 1882, was valid under s. 106 and s. 111, cl. (*h*) of the Transfer of Property Act, and was therefore sufficient to determine the tenancy, and that as this suit for ejectment was not brought till long afterwards, namely, the 1st of February, 1883, it was maintainable. And in order to guard myself against being misunderstood, I wish to observe that in this appeal, as it has been argued before us, we are not concerned with the question whether the plaintiff is entitled to recover any money as rent or otherwise from the defendant for any period subsequent to the end of December, 1882. I may add that no case has been cited in which the notice to quit, being worded as in this case, was held to be invalid in law for the purpose of terminating the tenancy.

I would dismiss the appeal with costs.

1885 *February* 21.

FULL BENCH.

Before Sir W Comer Petheram, Kt, Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and, Mr. Justice Mahmood.

JAMAITUNNISSA (DEFENDANT) *v.* LUTFUNNISSA (PLAINTIFF).*

Civil Procedure Code, ss. 540, 561, 584—*Decree—Judgment—Appeal—Objections by respondent to decree—Res judicata—Civil Procedure Code, s* 13.

In a suit to obtain possession of certain property, and to set aside a deed called a deed of endowment (*wakfnama*) on the ground that the defendant had fraudulently obtained its execution, the defendant pleaded (i) that the deed was a valid one, and (ii) that she was in possession of the property in satisfaction of a dower-debt, and her possession could not be disturbed so long as the debt remained unsatisfied. The Court of first instance held that the deed was invalid, but that the defendant was entitled to remain in possession of the property till her dower-debt was satisfied, and the Court passed a decree which merely dismissed the suit, without embodying the finding as to the deed. On appeal by the plaintiff to the District Judge, the defendant filed objections under s 561 of the Civil Procedure Code in regard to the first Court's decision that the deed of endowment was invalid. The Judge dismissed

* Second Appeal No. 1186 of 1883, from a decree of C. J Daniell Esq, District Judge of Moradabad, dated the 9th May, 1883, affirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 10th March, 1883.

the plaintiff's appeal, affirming the finding as to dower, and, refusing to decide the question of the validity of the deed, as being unnecessary for disposal of the claim, disallowed the defendant's objections. The defendant appealed to the High Court.

Held by the Full Bench (OLDFIELD and MAHMOOD, JJ., dissenting) that if a decree is, upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable, and nothing else, that party has no right of appeal therefrom. If, in the judgment of which such decree is the formal expression, findings have been recorded upon some issues against that party, and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s. 561 of the Civil Procedure Code, or of appealing therefrom under s. 540, he must take steps under s. 206 to have the decree properly brought into conformity with the judgment, so that there may be matter on the face of it to show that something has been decided against him; but if he fails to take this course, the decree, though in general terms, will stand good as finally deciding the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself rested.

The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of, as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by s. 13 of the Civil Procedure Code.

Held also that, in the present case, the Judge was right in holding that the question as to the validity or otherwise of the deed of endowment was wholly immaterial.

The judgment of STRAIGHT, J., in *Lachman Singh, v. Mohan* (1) approved and followed.

Per OLDFIELD, J., *contra*, that the decree, to agree with the judgment and fulfil the requirements of s. 206 of the Civil Procedure Code, should contain the material points for determination arising out of the claim and material for the decision thereon; that if this has not been done, the defect is a good ground of appeal, notwithstanding that the decree, on its face, may be altogether in favour of the appellant, and notwithstanding that he may not have applied for amendment of the decree under s. 206, or for review of judgment; and that, in the present case, the defect in the decree would afford a good ground of appeal.

Per MAHMOOD, J., that inasmuch as the provisions of s. 13 of the Civil Procedure Code relate as well as to the trial of issues as to the trial of suits, and in the present case the validity or otherwise of the deed was a matter directly and substantially in issue between the parties, and was adjudicated upon, the finding of the first Court upon that issue was not a mere *obiter dictum*, but would be binding upon the defendant as *res judicata* notwithstanding the fact that the suit against her was dismissed on the ground that she held possession of the property in lieu of dower; that whatever has the force of *res judicata* is necessarily appealable; that the word "from" as used in s. 540 or s. 584, and the expression "objection to the decree" in s. 561, refer not only to matters existing upon the face of the decree, but also to those which should have existed but do not exist there; and that the defendant in the present case was aggrieved or injured by the omission in the decree of the first Court, and was there-

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fore entitled to file objections to it, and, for the same reason, to appeal to the High Court from the decree of the lower appellate Court.

Also *per* MAHMOOD, J., that it was doubtful whether the reliefs contemplated by ss. 206 and 623 were open to the defendant; but that, even conceding that she ought to have sought her remedy under either of those sections, her neglect to do so did not make her incapable of obtaining the same result by the exercise of her right of appeal.

Anusuyabai v *Sakharam Pandurang* (1), *Man Singh* v. *Narayan Das* (2), *Mohan Lal* v. *Ram Dial* (3), *Niamat Khan* v. *Phadu Buldia* (4), *Pan Kooer* v. *Bhagwant Kooer* (5), referred to.

THIS was a reference to the Full Bench by Oldfield and Mahmood, JJ. The facts of the case and the points of law referred are stated in the order of reference, which was as follows:—

"This suit has been brought to obtain possession of certain property by right of inheritance from one Sikandar Ali Shah, and to set aside a deed, called a deed of endowment (*wakfnama*), which it is alleged the defendant fraudulently induced the said Sikandar Ali Shah to execute.

The defendant-appellant in this Court, Jamaitunnissa, amongst other pleas, contended in the Court of first instance that the deed was a valid one, and that she was in possession of the property in satisfaction of a dower-debt, and her possession could not be disturbed so long as the dower-debt remained unsatisfied.

The Court of first instance held that there was no valid deed of endowment which could interfere with the plaintiff's succession by inheritance, but that the defendant-appellant was entitled to remain in possession of the property till her dower-debt was satisfied, and the Court dismissed the suit, the decree being merely a decree dismissing the suit, without embodying the finding as to the deed of endowment. The plaintiff instituted an appeal in the Judge's Court, in respect of the finding in regard to dower, and she took other objections to the judgment and decrees; the defendant (appellant in this Court) filed objections under s. 561, Code of Civil Procedure, in regard to the Subordinate Judge's decision that the deed of endowment was invalid.

The Judge dismissed the plaintiff's appeal, affirming the finding as to dower, and refused to decide the question of the validity of

(1) I. L. R., 7 Bom. 484. (3) I. L. R., 2 All. 843.
(2) I. L. R., 1 All. 480. (4) I. L. R., 6 Calc. 319.
(5) N.-W. P. H. C. Rep., 1874, p. 19.

the deed of endowment, as he considered it unnecessary for disposal of the claim.

The decree dismissed the appeal, and disallowed the defendant's objections.

The defendant Jamaitunnissa has preferred a second appeal to this Court, and a preliminary objection has been urged by the respondent that the appeal is not maintainable.

It is contended that the appeal which is allowed by s. 584, Civil Procedure Code, lies from the decrees of the subordinate Courts, not from the judgments; and that as the decree of the Judge affirmed the decree of the first Court which dismissed the plaintiff's suit, no ground of appeal on which the defendant can maintain an appeal from that decree is open to her; and, in the same way, the defendant's objections under s. 561, Code of Civil Procedure, which she filed in the Judge's Court to the finding of the Court of first instance, were not maintainable under that section, since objections can only be taken to the decree or any part of it, and not to the judgment; and the decree of the Court of first instance only dismissed the plaintiff's suit, and did not embody the finding of the question of the deed, and there was therefore nothing in it to which the objections were applicable.

The respondents counsel relied on the Full Bench decision of this Court in *Pan Kooer* v. *Bhugwant Kooer* (1).

There is however, a more recent decision of this Court—*Lachman Singh* v. *Mohan* (2), which appears in some degree to modify the view of the law taken in the former case, and we think it desirable to refer the questions that have arisen in this case to the Full Bench.

"1.—Whether the appeal to this Court on the part of the defendant Jamaitunnissa is maintainable?

"2.—Whether her objections under s. 561 in the Judge's Court were maintainable?"

Mr. *A. Strachey*, Munshi *Hanuman Prasad*, and Shah *Asad Ali*, for the appellant.

Mr. *T. Conlan* and Babu *Ratan Chand*, for the respondent.

(1) N.-W. P. H. C. Rep., 1874, p. 19. (2) I. L. R., 2 All. 497.

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PETHERAM, C.J., and STRAIGHT and BRODHURST, JJ.—The two questions submitted to us by this reference in substance come to this:—Can a defendant file objections under s. 561 of the Code to, or appeal under s. 540 from, a decree, which upon the face of it dismisses the plaintiff's claim in general terms, and does not record any adverse finding or declaration in respect of such defendant? It seems to us that the decision of these points must turn upon the language of the two sections above mentioned, and with regard to the latter of them we adopt and approve the judgment of Straight, J., in *Lachman Singh* v. *Mohan* (1) in which he differed from the majority of this Court as then constituted. It may further be observed that the reasoning therein is applicable, *mutatis mutandis*, to s. 561, which confines the objections which may be taken by a respondent, to objections to the decree. We may add, as supporting the view we take, that there are two rulings of the Calcutta Court, one of a Division, the other of a Full Bench, to be found in the Indian Law Reports, 7, Calcutta Series, pp. 206 and 322. Shortly to summarise the opinion we hold, it is this:—If a decree is, upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable and nothing else, that party has no right of appeal therefrom. It may be that in the judgment, of which such decree is the formal expression, findings have been recorded upon some issues against that party; but if this be so, and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s 561 of the Code, or of appealing therefrom under s. 540, he must take steps under s. 206 to have the decree properly brought into conformity with the judgment, so that there may be matter on the face of it to show that something has been decided against him. In other words, he must obtain insertion in the decree itself, which alone contains the final determination of the cause, and not the judgment, such portions of the Court's findings as he considers himself injuriously affected by, so as to place himself in the position which the statute recognizes as giving him a right to impeach the decree. If he fails to follow this course, the decree, though in general terms, will stand good as finally deciding the

(1) I. L. R., 2 All 497.

issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself actually rested. More than these the decree cannot cover, and we are clearly of opinion that the findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by s. 13 of the Code. For, if in a second proceeding between the same parties, the question of *res judicata* is raised with regard to them, it is the former decree explained by the light of the pleadings, in the sense we have indicated as to what was then directly and substantially in issue in such first suit, which must be looked at in order to determine whether the plea in bar is a good or a bad one. In the case out of which this reference has arisen, the question as to the validity or otherwise of the so-called *wakfnama* was wholly immaterial, and the Judge in his judgment on the appeal has rightly so held.

The plaintiff claimed possession of the property by ejectment of the defendant, and the first Court held that the defendant was in possession and entitled to it in lieu of the dower-debt to her. Upon this finding alone, there was an end of the plaintiff's case, as the quality of the defendant's estate did not properly come into question, the moment it appeared she was at the time of the suit entitled to possession. We find that the decree before us is, on the face of it, entirely in favour of the defendant, and the proper presumption is that it has been correctly prepared in advertence to the judgment. The mode in which this presumption could have been rebutted and the decree set right is provided in s. 206 of the Code, and we do not think that any other mode than that directly created by statute for bringing the decree into conformity with the judgment exists, and that until it appears upon the face of the decree that something has been decreed adversely to the defendant, no right of appeal arises, because there is nothing in the decree itself for him to appeal against. Our reply to the two questions of this reference must therefore be in the negative.

OLDFIELD, J.—I have already expressed my opinion on the question raised by this reference in the case of *Lachman Singh* v.

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Mohan (1). S. 540 gives a right of appeal from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts. By s. 206 the decree must agree with the judgment, and it must specify clearly the particulars of the claim, and the relief granted, or other determination of the suit. The judgment must contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. The decree, therefore, to agree with the judgment and fulfil the requirements of s. 206, should contain the material points for determination arising out of the claim, and material for the decision thereon, and if any issue material for the decision of the suit has been decided, the determination of it should be contained in the decree; and if this has not been done, the defect is a good ground of appeal, notwithstanding that the decree, on its face, may be altogether in favour of the appellant. For instance, it might happen that a plaintiff's suit has been dismissed, but a material issue has been decided in his favour and against the defendant, the decree omitting mention of it, and merely containing a dismissal of the suit. Here I think the defect in the decree would afford a good ground for appeal. It has been said that the appellant's remedy in such a case is, under s. 206, to have the decree corrected or by review of judgment, and, when the decree has been amended, to institute an appeal; but it is possible that those sections would not afford relief, or that relief would be refused, and, if an appeal is denied him, he might be without any remedy at all.

Besides, the law expressly gives a right of appeal from decrees, and this right cannot be affected by the circumstances that the appellant might have had recourse to other remedies; and it seems to me a round-about and unsatisfactory mode of giving redress, to direct a party to get the decree put into proper form and then institute an appeal from it, when he might obtain redress direct by the institution of the appeal. I would reply to the references in the affirmative.

MAHMOOD, J.—I regret that in this case I am unable to concur in the conclusion at which the learned Chief Justice and the majo-

(1) I. L. R., 2 All. 497.

lity of the Court have arrived. I agree in the conclusion arrived at by my learned brother Oldfield, though upon grounds somewhat different from those which he has stated. The facts of the case are sufficiently set out in the order of reference, and I need not repeat them. The first question before us relates to appeals from decrees, and the second to objections to decrees under s. 561 of the Civil Procedure Code, and our answers to both questions must depend upon the same principle. My reason for saying this is, that both in s. 540, relating to first appeals, and in s. 561, relating to objections made by a respondent by way of cross-appeal, and in s 584, relating to second appeals, the word "decrees" is used, and whatever meaning we attach to the word in one of these sections, we must attach to it in all three. Reading the interpretation-clause of the Code, I think it impossible to hold that "decree" means the same thing as "judgment," because two different definitions are given of the two words, and these definitions are so clear that it is impossible to confound them. Bearing this in mind, it is important, applying a canon of construction which is followed in England, to consider the phraseology of the corresponding sections in the old Civil Procedure Code. In that Code, the section relating to first appeals corresponding to s. 540 of the present Code was s. 332, in which the word "decrees" was employed, but in s. 372 corresponding to s. 584 as to second appeals, the expression used was not "decree," but "decision." The same expression was also used in s. 348 of the old Code corresponding to s. 561. In the present Code, the word "decree" is uniformly used. I will not commit myself to the opinion that the Legislature necessarily meant different things by the words "decision" and "decree," but, if the change of phraseology implies any change in the law at all, it must be that appeals are now allowed from "decrees" only. This view is supported by the circumstance that in s. 594 the term "decree" is again defined for the purpose of appeals to Her Majesty in Council. The section says:—"In this chapter, unless there be something repugnant in the subject or context, the expression "decree" includes also judgment and order." This appears to me to show that the term "decree" as used in other parts of the Code must not be interpreted in such a wide sense, and it follows that neither

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appeals nor objections under s. 561, by way of cross-appeals, can lie otherwise than from decrees.

The determination of the questions now before us seems to depend therefore on two considerations—*first*, whether the *finding* or part of decree in respect of which the present appeal has been presented, is such a finding as could operate as *res judicata* ; and *secondly*, whether, if so, it does not follow that such finding or part of decree must be susceptible of appeal. I hold, following the *dictum* of Savigny quoted by West, J., in *Anusuyabai* v. *Sakharam Pandurang* (1), that the one question necessarily depends upon the other, and that "everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of *res judicata*."—Sav. Syst., s. 293. I understand this to be sound jurisprudence and indeed common sense, and I have no hesitation in saying that any system of procedure must be defective which is inconsistent with it. I proceed therefore to consider whether the finding of the Court of first instance, that the *wakfnama* was null and void, is such as would be binding upon the parties so as to preclude the appellant from showing in any subsequent litigation that the deed was valid.

In order to decide this question, I wish first to refer to the cases which were cited during the argument, and in the first place to the case of *Man Singh* v. *Narayan Das* (2), in which a Court of competent jurisdiction, having tried and determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine another issue which also arose out of the pleadings, but the determination of which in that suit was not required for its disposal. It was held that such Court was not bound under the circumstances to refrain from trying and determining such last-mentioned issue, and that the trial and determination of it could not be treated as a nullity, and the issue could not again be tried and determined in another suit. Another case supporting Mr. Strachey's contention is that of *Mohan Lal* v. *Ram Dial* (3), which was decided by a Full Bench of this Court, and in which it was held that an issue which had been directly

(1) I. L. R., 7 Bom. 464. (2) I. L. R., 1 All. 480.
(3) I. L. R., 2 All. 843.

and substantially raised between the parties, and had been determined, could not be re-opened, whatever the formal decree might show. There are several older cases in point, but I need only refer to *Ranee Sengur* v. *Ranee Rugsel* (1), and *Ram Das* v. *Bhyropershad* (2), in which it was held that where a usufructuary mortgagor sued the usufructuary mortgagee for recovery of possession of the mortgaged property, on the allegation that the mortgage had been liquidated by the usufruct, a finding that a certain sum still remained due, and which resulted in the dismissal of the suit, would be binding upon both parties. I should here mention a case on the other side decided by the Calcutta Court in 1862—the case of *Brijololl Upadhya* v. *Motee Soonderee* (3), in which it was laid down that in a suit by a mortgagor against a mortgagee to recover possession of property mortgaged under a *zur-i-peshgee* lease, the only question at issue being whether all the debts had been paid or whether the plaintiff could re-enter, the correctness of the account might be questioned by the defendant in any future suit. I only refer to this case incidentally, because I shall show further on why I am unable to accept the rule sanctioned by it. The latest case on the subject is *Niamut Khan* v. *Phadu Buldia* (4), in which the learned Judges of the Calcutta Court, after referring to certain rulings by the Privy Council, held that a finding of this description would amount to *res judicata* in subsequent litigation between the parties. The rulings referred to in that case make it clear to my mind that this decision would meet with the approval of their Lordships of the Privy Council, and I have therefore no doubt that, as the authorities stand, the finding of the Court of first instance in the present case regarding the *wakfnama* is one which would operate as *res judicata.*

I wish, however, to show that the terms of the statute justify this conclusion, because some of the rulings to which I have referred are older than the existing Civil Procedure Code. S. 13 of the Code, which relates to *res judicata*, deals with two matters, *first*, the trial of suits, and *secondly*, the trial of issues. Under

(1) N.-W. P., S. D. A. Rep., 1853, p. 112.
(2) N.-W. P., S. D. A. Rep., 1854, p. 388.
(3) W. R., Sp., 33.
(4) I. L. R., 6 Calc. 319.

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Act VIII of 1859, the terms of the Act limited the prohibition of further trial to *suits* which had been previously tried and determined. S. 2 ran thus :—"The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim." In that section the principle of *res judicata* was embodied only to a limited extent; but, in interpreting the section, the Privy Council holding that, apart from legislative enactment, the principle of *res judicata* was an essential part of the law of procedure in every civilized country, applied that principle to the trial of issues as well as to the trial of suits. S. 13 of the present Code is founded on a long course of judicial decisions, and especially on the *dicta* of the Privy Council, and has formulated in express terms the rule, which previously was only expressed in part by legislative enactment, that the principle of *res judicata* applies both to the trial of suits and to the trial of issues. The distinction between the two things appears to me to be clear. A suit ends in a dismissal or a decree, in whole or in part. An issue ends in a *finding*; and the rule contained in s. 13 goes the length of saying that not only is a *suit* which has once been tried and determined not again maintainable, but an *issue* which has once been *directly* and *substantially* raised and decided, shall not be litigated a second time. I draw this distinction without expressing any view as to what I shall presently consider, namely, that a matter directly and substantially in issue must necessarily affect the decree in the suit in which such an issue has arisen. Now, Explanation I. provides that "the matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other." In the present case the plaintiff distinctly alleged that the *wakfnamna* was invalid. The defendant as distinctly denied it. So there can be no doubt, with reference to Explanation I., that this was a matter directly and substantially in issue between them. In the next place, Explanation II., provides that "any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit." In reference to the word "ought" I think that, the suit being for

ejectment, the defendant was bound not only to put forward her defence that she was in possession of the property in virtue of her dower-debt, but also the other defence, based upon a higher title, namely, that she had received the property under a deed of gift.

I have therefore no doubt that the validity of the deed was a "matter directly and substantially in issue," and that the result of the finding upon that issue would have the effect of *res judicata* in subsequent proceedings between the same parties. Upon this point I desire to refer to the observations of West, J. in *Anusuyabai* v. *Sakharam Pandurang* (1), where that learned Judge, just before citing the passage from Savigny, to which I have already referred, remarked that "from a judgment against a plaintiff no adjudication in his favour can properly be derived as *res judicata*. It is not and cannot be an essential element of the jural relation on which an adverse decree rests, and no appeal lies against a merely incidental decision by one who is not in any way prejudiced by the concluding decision to which the partial ones are but subsidiary." Now West, J. is a Judge with whom I never differ except with great diffidence, but I am obliged to say that with his judgment in that case I can only partly agree. I entirely go with him in his view that whatever has the authority of *res judicata* must be subject to appeal; but I cannot agree that in the case with which he was dealing there was no *res judicata* as to the plaintiff's ownership of the lands. I now pass to the case of *Niamat Khan* v. *Phadu Buldia* (2). I have carefully read the judgments of the learned Judges who decided that case, and I confess I am unable to reconcile them with the judgment of West, J., in *Anusuyabai* v. *Sakharam Pandurang* (1). What the learned Judges of the Calcutta Court held was, that the finding contained in the judgment only does operate as *res judicata*, but that because the person who benefits by the decree in the suit does not take care that something should be entered in the decree which is distinctly adverse to him, he is debarred from appealing from such defective decree, and yet the finding stands conclusive against him. West, J., on the contrary, held that whatever had the force of *res judicata* was necessarily appealable. Numerous other rulings have

(1) I. L. R., 7 Bom. 464. (2) I. L. R., 6 Calc. 319.

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been cited, and among them *Pan Kooer* v. *Bhugwant Kooer* (1). What was ruled in that case was not long afterwards distinguished from cases like the present by *Ram Gholam* v. *Sheo Tahal* (2). In that case, the plaintiffs sued for the redemption of certain mortgaged property, and the defendants-mortgagees raised two defences to the suit; first, that the plaintiffs were not the heirs of the deceased mortgagor, and were therefore not entitled to redeem; and secondly, that, even if they had a *locus standi*, the mortgage-debt had not been satisfied. The Court of first instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had not been satisfied. It was held by this Court that the defendants were entitled to appeal, and that the case of *Pan Kooer* v. *Bhugwant Kooer* (1) was not applicable. Again, in the case of *Lachman Singh* v. *Mohan* (3), a defendant was allowed to appeal against a decree in the following terms:—"Ordered that the plaintiff's claim as it stands at present be dismissed." In that case, it is true that my learned brother Straight dissented from the opinion of the majority, but the decision of the Full Bench was that, under the circumstances, an appeal would lie. Another case—referred to by West J., in *Anusuyabai* v. *Sakharam Pandurang* (4)—is *Balak Tewari* v. *Kausil Misr* (5), to which I was a party, and in which a decision was arrived at on a reasoning somewhat, though not altogether, inconsistent with my present view. In regard to that case, I will only say that it is not quite on all fours with the present, and that I concurred in the judgment of my learned brother Tyrrell out of deference to the ruling of the Full Bench in *Pan Kooer* v. *Bhugwant Kooer* (1), and probably in ignorance of the ruling in *Ram Gholam* v. *Sheo Tahal* (2), and in the later case of *Lachman Singh* (3).

Having referred to these cases, I wish to illustrate how any other view of the rule of *res judicata* would materially defeat the policy of the law upon which the rule itself is based. The reason of the maxim *Nemo debet bis vexari pro eadem causa* seems to me to apply as much to the trial of issues as to the trial of suits, for in either case the harassment to litigants would be similar if matters could be re-agitated after having been once duly adjudi-

(1) N.-W. P. H. C. Rep., 1874, p. 19.
(2) I. L. R., 1 All., 266.
(3) I. L. R., 2 All. 497.
(4) I. L. R., 7 Bom. 464.
(5) I. L. R., 4 All. 491.

cated upon. Such I understand to be the rule laid down in the celebrated case of the *Duchess of Kingston*, and to have been repeatedly applied by the Lords of the Privy Council to Indian cases, some of which were cited by the learned Judges of the Calcutta Court in the case of *Niamut Khan* v. *Phudu Buldia* (1), to which I have already referred, and, as I have already indicated, s. 13 of the Civil Procedure Code only reproduces the well known rule of law. I am aware that nothing which constitutes mere *obiter dictum* can bind the parties; but it seems to me to be equally certain that a finding which conclusively binds one party must necessary bind the opposite party also, and that, but for this reciprocity, the rule of *res judicata*, far from attaining its object of putting an end to litigation, would only achieve the contrary result of increasing litigation. Now taking, *exempli gratia*, the cases of *Ram Gholam* v. *Shio Tahal* (2) and *Anusuyabai* v. *Sakharam Pandurang* (3), to both of which I have already referred, I confess I am unable to conceive what advantage could have been gained by allowing the issue as to the title of the plaintiffs to be re-agitated in any subsequent litigation; indeed they could not be re-agitated, according to the rule laid down by the Lords of the Privy Council in the case of *Soorjomonee Dayee* v. *Suddanund Mohapatter* (4):—"If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed, which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*." Now, in either of the two cases which I have taken for the sake of illustration, the finding as to the substance of the mortgage would undoubtedly be binding upon the plaintiff, because it was on that ground that his suit was dismissed; nor can there be any doubt that that same finding would be binding upon the defendant. Indeed the finding itself would be unintelligible but for the finding in favour of the plaintiff's title which was made the subject of appeal in those two cases with opposite results—one Court holding that the appeal would lie and the other that it would not To take the illustration further, I will suppose the case of a plaintiff-mortgagor suing for redemption on the gound that the usufruct of the mort-

(1) I. L. R., 6 Calc. 319.
(2) I. L. R., 1 All. 266.
(3) I. L R, 7 Bom. 464.
(4) 12 B. L. R., 304.

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gaged property had paid off the mortgage; the defendant resists the suit on the ground that Rs. 5,000 is still due on the mortgage; and the Court, having taken accounts, arrives at the conclusion that only Rs. 200 is still due, and on that ground dismisses the suit. The finding as to the balance of the account would no doubt be binding upon the plaintiff, whose suit has been dismissed upon that ground, and I confess I fail to see how it can bind the plaintiff and not the defendant; for, as I said before, the principle of reciprocity is an essential element of the rule of *res judicata*. The result of a contrary view would be that in a subsequent suit by the same plaintiff, in which he offered to redeem the mortgage on payment of the balance found due against him in the former suit, the defendant-mortgagee might again re-agitate the issue as to the accounts, and harass the plaintiff again, thus defeating the policy of the maxim upon which the ruling of *res judicata* itself is based. There might indeed be a series of redemption suits by such a mortgagor, and in each case he might be called upon to prove that which he had already proved before; and it might be that in each case upon the same accounts the Court arrived at a different conclusion as to the balance still due on the mortgage. I cannot conceive that the rule of *res judicata* contemplates any such results—*interest reipublicæ ut sit finis litium*. Applying these principles to the present case, I repeat what I said before, that the adjudication as to the invalidity of the *wakfnama* would be binding upon the defendant as *res judicata* notwithstanding the fact that the suit against her was dismissed on the ground that she held possession in lieu of dower.

I now come to the direct question raised by this reference:—Is the present case an appeal from a decree? I do not understand the word "from" as used in s. 540, or s. 584, or the expression "objection to the decree" in s. 561 of the Civil Procedure Code to refer only to matters existing upon the face of the decree, and not to those which should have existed but do not exist in the decree. In my opinion, if certain prayers are made by a plaintiff or certain defences set up by a defendant in a suit, and one only of such prayers is granted by the decree, and a defence furnishing a full answer to the suit, though adjudicated upon, is not in the decree, the party objecting to such omission is entitled to say that the

decree is wrong, because he appeals "from" the decree. The claim in the present case (though the plaint is not as scientific as it might be) is two-fold ; first, that a deed of gift set up by the defendant may be declared invalid ; and secondly, that the plaintiff be awarded possession of the property in suit. The decree dismissed the suit, regarding it merely as a suit for possession. But the complaint of the defendant is that it should have dismissed it absolutely on the ground that the defendant was full owner, as the deed of gift was valid ; in other words, that the suit should have been dismissed *in toto* on the ground that the plaintiff's right of inheritance did not apply to the property in suit, as it did not belong to the deceased at the time of his death. This not having been done by the decree, the defendant is aggrieved or injured by the omission in the decree which, though defective, and though on the face of it dismissing the plaintiff's suit, in effect decrees her claim so far as it related to the invalidity of the *wakfnama*, and could at best be taken to dismiss the suit in the form in which the suit was brought, as was the case in *Lachman Singh* v. *Mohan* (1), where a right of appeal was allowed to the defendant. When the case went to the lower appellate Court, it might be viewed in two aspects. S 561 of the Code gives two distinct rights to the respondent in the appeal. The first is the right of upholding the decree of the Court of first instance on any of the grounds which that Court decided against him, and, in that case, no notice or memorandum of the kind required by the last paragraph of the section would be necessary. The second right is that of taking any objections to the decree which the respondent might have taken by way of appeal. If the Judge in this case had held that the defendant's possession was not in lieu of her dower-debt, but under the deed of gift, and had maintained the first Court's decree, then no doubt the *plaintiff* would have had a right of appeal, not only in respect of the finding of the first Court that the defendant's possession was in lieu of her dower, but also in respect of the lower appellate Court's finding, that it was in virtue of the deed of gift. I do not see why the right of appeal should be allowed to one party and not to the other in respect of the same matter, namely, the validity or invalidity of the *wakfnama*. I

(1) I. L. R., 2 All. 437.

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make this observation bearing fully in mind the distinction drawn by the Civil Procedure Code between "judgment" and "decree." Issues are the result of the pleadings of the parties (ss. 146 and 147, Civil Procedure Code); evidence is taken on the issues; judgment constitutes the finding upon that evidence with reference to the issues; and decree is the up-shot or the result of those findings. It is of course possible that when more than one issue arises in a suit the answer to one issue may furnish a full basis for the disposal of the *whole* suit, either by decreeing it or dismissing it. In such a case, it is perfectly conceivable that if the Court went on to record findings upon other issues not essential to the justification of the decree, such findings might be mere *obiter dicta*, not having the force of *res judicata*. From such *obiter dicta*, as I said before, no appeal could lie. But in a case like the present, where the prayer of the plaintiff not only claimed possession but also sought the cancellation of the *wakfnama*, the pleading of the parties necessarily gave rise to two issues essential for the disposal of the suit—essential in the sense of rendering the dismissal of the *whole* suit impossible without the determination either of both issues in favour of the defendant or of the issues as to the *wakfnama* in her favour. What the Court of first instance did in this case was to decide both issues—the main issue as to the defendant's title under the *wakfnama against* her, and the minor issue as to her possession in lieu of dower in her favour. There is no doubt in my mind that neither of the findings can be regarded as mere *obiter dictum*, but because both of these were directly and substantially in issue within the meaning of s. 13 of the Civil Procedure Code, and because both were adjudicated upon, they would operate as *res judicata* in any subsequent litigation between the parties. Such being the case, the defendant, in my opinion, had the right of appeal to the lower appellate Court "*from* the decree" within the meaning of s. 540 of the Civil Procedure Code, on the ground that the evidence produced by her entitled her to a decree throwing out the plaintiff's claim *in toto* in such a manner as to leave no room for another suit in which possession might be claimed on payment of dower in lieu of which the Court of first instance held the defendant to be in possession. If the intention of the appeal were to obtain an addition in the

decree to the effect that the *wakfnama* was invalid, it is obvious that the appeal would be meaningless, because such addition would, if anything, place the defendant appellant in a worse position than she was before under the decree of the first Court. The object of the appeal is quite the reverse. It undoubtedly aims at having an addition made in the decree to remove a defect, but the appellant's prayer is, that that addition should be to declare her title in the property to be absolute, and not merely in lieu of dower. Such a complaint can, according to my view, be made the subject of an appeal "from the decree," or of an "objection to the decree," within the meaning of ss. 540, 584, and 561 of the Civil Procedure Code respectively.

This leads me to the consideration of the argument that a full remedy was given to the defendant by s. 206 of the Code. In the first place, it appears to me to be very doubtful whether s. 206 entitles a defendant in a case such as this to have the decree so prepared as to make it more expressly adverse to him; and, in the next place, it cannot be forgotten that if the Court which passed the decree declined to amend it, such refusal could not be made the subject of appeal under s. 588 or any other part of the Code, and, in the case of *Raghunath Das* v. *Raj Kumar* (1), my learned brother Oldfield and I have differed even upon the question whether any order passed under s. 206 can be made the subject of revision.

The case has been ably argued by Mr. Strachey, and before concluding I wish to notice the excellent manner in which he met the objection that the object of the defendant's present appeal and other objections under s. 561 before the lower appellate Court might have been achieved by her by applying for review of judgment under s. 623 of the Civil Procedure Code. I accept his argument that the word "decree" which occurs in that section would be an insuperable impediment in the appellant's way for such a remedy if the argument of the learned counsel for the respondent is to be excepted, because the word "*decree*" occurs in that section, and must be interpreted in the same sense as in ss. 540, 561, and 584 of the Civil Procedure Code.

(1) *Ante* p 276

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Apart from this, however, I confess that I am unaware of any rule that if more than one remedy is provided by statute for any grievance or injury, either of such remedies, in the absence of express provisions to that effect, is a bar to the other. Even conceding that the defendant in this case ought to have sought her remedy under s. 206 or under s. 623, I cannot hold that her neglect to do so makes her incapable of obtaining the same result by the exercise of her right of appeal.

For these reasons, my answer to the two questions referred to the Full Bench is in the affirmative.

APPELLATE CIVIL.

1885 *March 6.*

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MULCHAND (DEFENDANT) *v.* BHIKARI DAS (PLAINTIFF)*

Act XII of 1881 *(N.-W. P. Rent Act), s.* 140—*Case struck off with liberty to plaintiff to bring a fresh suit—Omission to sue for part of claim in case struck off—Fresh suit for omitted claim not barred—Civil Procedure Code, s.* 43—*Act XII of* 1881, *s.* 93 *(h)—Village expenses—Expenses of cultivating sir-land held in partnership by plaintiff and defendant.*

A recorded co-sharer of a mahal sued the lamberdar for his share of the profits of the mahal for the year 1286 fasli. At the time of the institution of the suit, the profits for 1287 and 1288 fasli also were due, but no claim was then made in respect of them. The suit was struck off on account of the non-appe arance of the parties, under s. 140 of Act XII of 1881 (N.-W. P. Rent Act), with leave to the plaintiff to bring a fresh suit. Subsequently the plaintiff brought a suit against the same defendant for his share of the profits of the mahal for 1287 and 1288 fasli.

Held that the suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

Held also that the Courts below had properly refused to deduct from the plaintiff's claim as "village expenses" within the meaning of s. 93 (*h*) of the Rent Act, certain charges on account of the expenses of cultivation of *sir*-land held in partnership by the plaintiff and the defendant.

THE plaintiff in this suit, a recorded co-sharer of a mahal, sued the defendant, the lambardar, for his share of the profits of the mahal for the fasli years 1287 and 1288. It appeared that in January, 1882, the plaintiff had brought a suit against the defend-

* Second Appeal No. 514 of 1884, from a decree of T. B Tracy, Esq., Offg. District Judge of Bareilly, dated the 31st January, 1884, affirming a decree of H. Blunt, Esq., Deputy Collector of Bareilly, dated the 14th September, 1883.

ant for his share of profits for 1286 fasli, and that, at the time when that suit was instituted, the profits now claimed were due. There was in that suit no adjudication between the parties, but the case was struck off under s. 140 of Act XII of 1881 (N.-W. P. Rent Act), with leave to the plaintiff to bring a fresh suit. It was contended in this suit on behalf of the defendant that the suit was barred by the provisions of s. 43 of the Civil Procedure Code. It was urged that the plaintiff, having omitted to sue for the profits for 1287 and 1288 fasli when he filed his plaint on account of the profits for 1286 fasli, was now barred from suing in respect of 1287 and 1288 fasli.

The Court of first instance decreed the claim, holding that the provisions of s. 43 of the Civil Procedure Code did not apply to a case in which there had been no adjudication, and in which leave had specially been granted to the plaintiff to bring a fresh suit. On appeal, the defendant contended that the Court of first instance had erred in not applying the provisions of s. 43 of the Civil Procedure Code to the case. He further contended that the Court of first instance ought not to have refused to deduct from the plaintiff's claim certain charges described as "*sir* expenses," *i. e.*, the expenses of cultivation of *sir*-land held in partnership by the plaintiff and the defendant.

Upon the first point, the lower appellate Court observed:— "Had the claim in respect of 1286 fasli been decreed or dismissed by the Court after hearing the parties and their witnesses, the present suit would unquestionably have been barred by the operation of s. 43. But, the suit having been struck off on account of the non-appearance of the parties, it seems only reasonable that the plaintiff-respondent should be considered to be in the same position as if he had never filed the suit." In regard to the claim of the defendant to "*sir* expenses," the Court observed:— "This does not appear, properly speaking, to be an item of the village-expenses contemplated by s. 93 (*h*) of the Rent Act." In second appeal, the defendant contended again (i) that the claim was barred by the provisions of s. 43 of the Civil Procedure Code, (ii) that the Courts below had erred in disallowing the cost of cultivating the *sir* land, and (iii) that the lower appellate Court had not disposed of all the pleas in appeal before it.

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Munshi *Kashi Prasad*, for the appellant.

Mr. *A. S. T. Reid*, for the repondent.

STRAIGHT, J.—I think the Courts below have rightly held that the suit is not barred by the provisions of s. 43 of Act XIV of 1882. It appears that the plaintiff formerly sued the defendant for his share of the profits of 1286 fasli. At the time of the institution of that suit the profits now claimed were due. This suit was struck off on account of the non-appearance of the parties, under s. 140 of Act XII of 1881, and leave was specially reserved for the plaintiff to bring a fresh suit. I do not see anything in the law to prevent the plaintiff from bringing the present suit. At any rate, before the case was struck off he could have so amended his plaint as to have included the present claim. If he could do so, *à fortiori* I do not see any reason why he should not do the same in a fresh suit. As it is, the claim for 1286 fasli is barred by limitation, and the plaintiff can now proceed with his claim in respect of 1287 and 1288 fasli.

I also concur with the Judge in that portion of his judgment in which he disposes of the plea about *sír* expenses. As to the third plea, the judgment of the Judge fully disposes of all the pleas. The appeal is dismissed with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

1885 *March 7.*

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

NIAMAT ALI (PLAINTIFF) *v.* ASMAT BIBI AND ANOTHER (DEFENDANTS*.

Pre-emption—Wajib-ul-arz—"Rights and interests"—"Qimat"—"Sale"—Exchange.

The *wajib-ul-arz* of a village gave a right of pre-emption by a clause providing that in case of transfer by any co-sharer of his rights and interests (*haqiyat*), his partners should have a right to purchase at the same price (*qimat*) as the vendee had given. One of the co-sharers transferred to a stranger one biswa and six dhurs of a grove or garden in exchange for another piece of land.

Held by the Full Bench that this transaction was a transfer of *haqiyat* within the terms of the *wajib-ul-arz*.

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* Second Appeal No. 1655 of 1883, from a decree of Babu Ram Kali Chaudhri Subordinate Judge of Allahabad, dated the 31st August, 1883, reversing a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 2nd February, 1883.

Held also that the plot of land which was given in exchange for the one biswas and six dhurs must be considered as a price (*qimat*), within the terms of the *wajib-ul-arz*.

Per MAHMOOD, J., that the word "*qimat*" must be interpreted in the sense given to it by the Muhammadan Law, including not only money but other kinds of property capable of being valued at a definite sum of money, and covering the consideration of "sale" as well of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) respectively. *Sahib Ram* v. *Kishen Singh* (1) referred to. *Hazari Lal* v. *Ugrah Rai* (2) dissented from.

THE plaintiff in this case sued to enforce the right of premption, in respect of one biswa and six dhurs of a grove or garden consisting of three bighas and two biswas of land, which the defendant Farukh Ali had transferred to the defendant Minhajuddin in exchange for another piece of land. The suit was based on the *wajib-ul-arz* of the mahal in which the land in suit was situated, and the plaintiff claimed on the ground that he and Farukh Ali were sharers in the same thoke, and the defendant Minhajuddin was not a sharer in that thoke. The plaintiff valued the land at Rs. 5, and claimed possession on payment of that sum, or any sum which the Court might determine the value of the land to be. The defendant Minhajuddin defended the suit on the grounds, amongst others, that the provisions of the *wajib-ul-arz*, in respect of the right of pre-emption, applied only to revenue-paying interests in the mahal, and not to "an isolated piece of garden land, not assessed to Government revenue," and that, the land not having been sold, but having been exchanged, the transfer gave the plaintiff no cause of action.

The provision in the *wajib-ul-arz* relating to the right of pre-emption was as follows:—"*Ba surat intiqal haqiyat kisi patidar ki us qimat par jo shakhs ghair dawe istehqaq kharidari awal shurkai karib, etc.*"

"If any sharer transfer his rights and interests (*haqiyat*), near partners, *etc.*, have a right to purchase at the same price (*qimat*) which the stranger gives."

The Court of first instance gave the plaintiff a decree for possession of the land in suit on payment of Rs. 13 as "compensation" to the defendant Minhajuddin within one week.

On appeal by the legal representatives of the defendant Minhajuddin, who had in the meantime died, the lower appellate

(1) Weekly Notes, 1882, p. 192. (2) Weekly Notes, 1884, p. 103.

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Court held that the suit was not maintainable and dismissed it. It observed as follows:—

"The first question that the grounds of appeal raise is, whether the land in dispute is subject to the pre-emptive clause of the *wajib-ul-arz*. The word '*haqiyat*' is used in it as being subject to pre-emption on its being transferred by its owner. This word is ordinarily understood in the sense of a zamindari right in a village expressed in annas or biswas in undivided estates, and in bighas and biswas when an estate is divided. This sense the word '*haqiyat*' bears when it is not accompanied by qualifying terms. When in common parlance we say such a body's *haqiyat* is sold, we mean that his zamindari right in a village, the extent of which is expressed in the manner above observed, is sold, and not that any specific thing, such as a particular plot of land, cultivated or uncultivated, a particular grove, orchard or garden, or a particular part of the habitation site that is comprised within zamin-right rights, is sold. Court people have frequently in their mouths the word '*haqiyat* cases.' These cases are understood to be those in which shares of zamindari rights are concerned, and not any house, site, garden (*bagh*), land of a *bagh*, tank, trees, or a particular parcel of cultivated or uncultivated land, though these may be things appertaining to a share of zamindari rights. Such being the ordinary meaning of the word *haqiyat*, it must be held to have the same meaning when used in the pre-emptive clause of the *wajib-ul-arz* of mauza Manauri, where the land in dispute is situated. Consequently the condition of pre-emption as inserted in it cannot be taken to apply to the particular piece of land that is the subject of dispute in this case. I may also observe that the ruling of the Full Bench of the Allahabad High Court in the case of *Sahib Ram* v. *Kishen Singh* (1) applies in this case, inasmuch as the particular piece of garden-land in dispute in this case bears a character similar to that of the *abadi* land in dispute in that case. The question raised on this head is therefore found in favour of the appellants. The second ground of appeal raises the question whether the pre-emption condition of the *wajib-ul-arz* applies to exchange of lands. In my opinion it does not. That condition is to the effect that in case of transfer (*intiqal*) of the

(1) Weekly Notes, 1882, p. 192.

haqiyat (share of zamindari right) of any pattidar or co-sharer, the right to purchase of the co-sharer (as mentioned in the said record) at the price (*qimat*) offered by a stranger would be preferable. The words '*qimat*' (price) and '*kharidari*' (purchase) used in the clause show that the transfer mentioned in the condition means a sale for a price (*qimat*). Now the word *qimat* in the ordinary acceptance of it means a money-price, and not any other benefit that is received in exchange for a thing. If I am right in this interpretation, the parties to the agreement involved in the said condition of pre-emption had it in their contemplation that when a zamindari share is sold for a money price by a pattidar to a stranger, the co-sharers (as mentioned in the clause) would have the right of pre emption in respect of it. This Court therefore cannot hold the said pre-emptive clause to apply to a case of exchange of lands, such as is the subject of dispute in this case."

On second appeal by the plaintiff, the Divisional Bench (BRODHURST and DUTHOIT, JJ.), hearing the appeal, referred the following questions to the Full Bench:—

"(1) Was the transfer of the one biswas and six dhurs of land made by Farukh Ali, on the 13th August, 1881, or was it not, a transfer of *haqiyat* within the terms of the *wajib-ul-arz*? (2) Can the plot of land which was given in exchange by Minhajuddin, or can it not, be considered as a price (*qimat*) within the terms of the *wajib-ul-arz*?"

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *G. E. A. Ross* and Babu *Ram Das Chakarbati*, for the respondents.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—I think that the first question referred to us in this case must be answered in the affirmative. It is—"Was the transfer of the one biswa and six dhurs of land made by Farukh Ali, on the 13th August, 1881, or was it not, a transfer of *haqiyat* within the terms of the *wajib-ul-arz*? The only question here is, whether a transfer of a part of a man's land in a village can be considered a "transfer of his rights and interests" within the meaning of the *waji-bul-arz*. Now documents like the *wajib-ul-arz* must be read as a whole and in the light of common sense, and,

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so read, it is evident that the object of the *wajib-ul-arz* is the exclusion of strangers from the village. If it is so read that although a man may not sell the whole, he may sell a *part*, of his land in the village, without letting in the right of pre-emption, the whole object of the *wajib-ul-arz* would be defeated, because the result might be the admission of a great number of strangers. That appears to me to amount to a *reductio ad absurdum*, and I am therefore of opinion that when any co-sharer sells any part of his land, the right of pre-emption belonging to his partners arises. My answer to the first question is therefore in the affirmative.

My answer to the second question is in the affirmative also. As I understand the matter, this right of pre-emption has arisen out of a very old custom, under which land was originally occupied by families or communities, and the rule originally was that if any individual went away or failed, his share became divisible among the rest. But afterwards there grew up a right based upon custom, by which the owner, before going away, might sell his share to his neighbours. And later still, he became entitled to sell the share, not only to them but to a stranger, unless his co-sharers chose to buy him out. In that case, the right to sell to the stranger arose upon the refusal of the co-sharers to make the purchase.

It is to this custom that the terms of the *wajib-ul-arz* appear to me to give expression, and the matter therefore comes to this, that before any sharer is competent to transfer his rights and interests, he must offer to transfer them to his co-sharers. It is true that the *wajib-ul-arz* shows that before the co-sharers can fix the price, the owner is entitled to get what he can from an outsider, so that he can insist upon their giving the same. Under these circumstances, the word "*qimat*" is used, and it seems to be generally agreed that the meaning of this word is not "money," but "equivalent" or "value."

If, therefore, the co-sharers want to get the land, they must give the vendor the equivalent or value of the thing for which he desires to exchange his property. Now, in all countries sufficiently advanced in civilization to possess coinage, money is the accepted standard of value, and therefore, because in this case the co-sharers cannot give the thing for which the vendor agreed to exchange his

land—it being another piece of land which does not belong to them—they have a right to obtain his land for an equivalent in money. My answer to the second question therefore is in the affirmative.

STRAIGHT, J.—I cannot concur in the contention that the pre-emptive clause of the *wajib-ul-arz* is only intended to apply to cases in which a sharer parts with the whole or considerable portion of his *haqiyat*. If this argument were to be admitted, it would, in my opinion, be open to any sharer to defeat such right by disposing of his *haqiyat* piece-meal. I then come to the question whether there was such a transfer of the vendor's *haqiyat* in the present case as gave birth to the plaintiff's right of pre-emption. I think that the exchange was an undoubted transfer of the one biswa and six dhurs to the vendee. The remaining point to be determined is whether the field given in exchange by the vendee to the vendor can be regarded as the price given, for the purpose of supplying a basis upon which the plaintiff must compensate the vendor. I think that it can, and that the plaintiff, before getting the one biswa and six dhurs must pay whatever may be found to be the value of the field given by the vendee.

OLDFIELD, J.—My answer to both the questions referred to us is in the affirmative. I wish, however, to express no opinion as to whether the pre-emptor can force the vendor or the vendee to take the value of the property exchanged, that not having been the object of the contract under which the exchange of land for land was intended. Nor do I express any opinion as to whether the proper remedy of the pre-emptor was not rather to have the contract rescinded, and the vendor and vendee put back into their original position, in regard to the land which was exchanged.

BRODHURST, J.—I concur with the learned Chief Justice in answering both of the questions referred to us in the affirmative.

MAHMOOD, J.—I have arrived at the same conclusions. Upon the first question, as to the interpretation to be placed on the word "*haqiyat*," I have nothing to add to the observations which I made upon a cognate question in the case of *Sahib Ram* v. *Kishen Singh* (1), which was a case decided by a Full Bench, of

(1) Weekly Notes, 1882, p. 192.

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which I was a member, but had the misfortune of differing with the majority of the Court. The case has unfortunately not been reported in the Indian Law Reports, but I have adhered to the view which I then expressed as to the nature of the proprietary rights of a co-sharer in a mahal to which, under the *wajib-ul-arz*, the right of pre-emption applies. That case related to the question whether the *abadi* area or habitable site of a village came within the meaning of the term "*haqiyat*;" and in the present case the property appears to be a grove. The *ratio decidendi* of my judgment in that case is, *mutatis mutandis*, entirely applicable here, and therefore my answer to the first question must be in the affirmative. I may add, in reference to this question, that in the case of *Bazari Lal* v. *Ugrah Rai* (1), the Full Bench ruling to which I have referred was relied on in connection with *sir*-land. With all due deference, I dissent from the decision, and must express myself unable to accept the rule of the law therein laid down.

Upon the second question, I have nothing to add to what the learned Chief Justice has said from the Bench on several occasions. The rule of pre-emption was originally introduced into India as a part of the Muhammadan law, and must, by equitable analogy, be administered in the spirit of that law. This view was adopted by Sir Barnes Peacock, C. J., a good many years ago. It therefore appears to me that the word "*qimat*," which is of Arabic origin, must be interpreted in the sense given to it by the Muhammadan law, and that is undoubtedly not the technical meaning of the English word "price." In the law of pre-emption "*qimat*" includes not only money, but other kinds of property capable of being valued at a definite sum of money. This is borne out by the passage in Hedaya, which has been cited at the Bar :— "If a man sell a piece of ground for another piece of ground, in this case, as each piece of ground is the price for which the other is sold, the *shafee* of each piece is entitled to take it for the value of the other, land being of the class of *zosat-al-keem*, or things compensable by an equivalent in money," (Grady's edition of Hedaya, p. 555), and in this sense the word may be taken to cover the consideration of "sale" as well as of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) res-

(1) Weekly Notes, 1884, p 103.

pectively. Any other view of the law of pre-emption would simply render the object of the right easily defeasible—the object being the exclusion of strangers from the co-parcenary of the property to which the right applies.

My answer to the second question also is therefore in the affirmative.

Before Sir W. Comer Petheram, Kt, Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

1885
March 14.

SITAL PRASAD AND ANOTHER (DEFENDANTS) *v.* AMTUL BIBI AND ANOTHER (PLAINTIFFS)*.

Sir-land—Sale of sir-land by co sharer—Validity of transfer—Act XII of 1881 *(N.-W. P. Rent Act), ss.* 7, 9—*Ex-proprietary tenant—Right of occupancy.*

Held by PETHERAM, C. J., and STRAIGHT, OLDFIELD, and BRODHURST, JJ. that the question whether the proprietary rights of a co-sharer in the *sir* of a mahal are distinct and separate from the proprietary rights in the mahal itself, so as to enable the owner of one share to sell and give possession of his *sir* alone as against his co-sharers, must be determined with reference to the tenure and conditions under which land is held in the mahal by the coparceners, to be ascertained in each case.

Per PETHERAM, C. J., and STRAIGHT, and OLDFIELD, JJ.—In zamindari tenures, in which the whole land is held and managed in common, a co-sharer cannot convey his right of occupancy in the *sir* as something distinct from his proprietary rights in the mahal. In pattidari tenures, in which the lands are divided and held in severalty, each proprietor managing his own lands, there may be lands which come within the classification of *sir* given in the Rent Act, but they would not seem to be on a different footing from any other land held in severalty by a proprietor.

Per BRODHURST, J.—So long as a person is the sole proprietor of a mahal, he is not restrained by any law from effecting a sale of his proprietary rights in his *sir* land, even though he retains possession of the whole of the other lands of the mahal.

Per MAHMOOD, J.—That the proprietary rights of a joint co-sharer in his *sir* land form an essential part of his rights in the mahal, that such proprietary rights in the *sir* land may be sold, but that the purchaser under such a sale could not obtain any such possession as would operate in defeasance of the ex-proprietary right in such *sir* land conferred by s. 7, and secured by s. 9 of the Rent Act. *Sahib Ram* v. *Kishen Singh* (1), *Hazari Lal* v. *Ugrah Rai* (2), *Gulab Rai* v. *Indar Singh* (3), and *Firmal Singh* v. *Bhola Singh* (4), referred to.

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* Second Appeal No. 130 of 1884, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Gházipur, dated the 22nd December, 1883, affirming a decree of Babu Nil Madhab Rai, Munsif of Gházipur, dated the 27th June, 1883.

(1) Weekly Notes, 1882, p. 192.
(2) Weekly Notes, 1884, p 103.
(3) I. L. R., 6 All. 54.
(4) Weekly Notes, 1884, p. 169.

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THIS was a reference to the Full Bench by Straight, Officiating C. J., and Brodhurst, J. The facts of the case and the point of law referred are stated in the referring order, which was as follows :—

STRAIGHT, Offg. C. J.—There is a question involved in this appeal which appears to me to be of considerable importance, and, as the view I entertain upon it as at present advised seems to me to be at variance with that inferentially expressed by a Division Bench of this Court in a case reported on page 103 of the *Weekly Notes* of the current year (1884)—*Hazari Lal* v. *Ugrah Rai*—I think it should be referred to the Full Bench.

The point is this :—The defendant, Shaikh Imam Ali, by a sale-deed of the 7th July, 1879, purported to convey to the defendants, Sital Prasad and Sohan Ram, three bighas fourteen biswas and nine and half dhurs of land which was admittedly his *sír* cultivation. The plaintiffs seek in the present suit to avoid this transfer on the ground that they, as co-sharers in the mahal with Shaikh Imam Ali, are jointly interested in such *sír*. Both the lower Courts have concurred in giving plaintiffs a decree for cancelment of the deed of sale and for a declaration of their right to joint possession along with Shaikh Imam Ali. Sital Prasad and Sohan Ram have appealed to this Court, and their first plea is, that there is no law to prevent a co-sharer from selling the *sír*-land in his possession. Looking to the terms of ss. 7 and 9 of the Rent Act, I am strongly inclined to hold that the lower Courts were right in the view they have taken in the matter, and that a proprietor's holding of *sír* must be regarded as an appurtenance of, and incidental to, his proprietary share, and that he cannot dispose of it apart from such proprietary share. It appears to me that if a transaction like the present were to be sanctioned, an easy means would be afforded to enable persons to defeat the provisions of s. 7 of the Rent Act, as to the accrual of ex-proprietary tenant's rights in the *sír* of a mahal at the date of the loss of the proprietary rights in such a mahal, and to nullify the prohibition of s. 9 of the same law. I would therefore refer to the Full Bench the following question :—Are these proprietary rights in the *sír* of a mahal distinct and separate from the proprietary rights in the mahal itself?

BRODHURST, J.—I concur in making the reference to the Full Bench as proposed by my learned colleague.

Munshi *Kashi Prasad*, for the appellants.

Lala *Lalta Prasad* and Shah *Asad Ali*, for the respondents.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J., and STRAIGHT and OLDFIELD, JJ.—There is nothing in the definition of *sír*-land given in the Rent Act, from which it can necessarily be inferred that the rights of a proprietor in such land are not capable of being sold apart from the other proprietary rights in a mahal, and the provisions of s. 7 only affect rights in *sír*-land at the time when a person loses or parts with his proprietary rights in a mahal. The question of the right of a proprietor to dispose of his *sír*-land must be determined with reference to the conditions of the tenure under which a mahal is held.

In what are called zamindari tenures, in which the whole land is held and managed in common, a co-sharer has no exclusive right in the *sír*-land, only a right to occupy and cultivate it, and the rents of it are taken into account at the distribution of profits. It is because a person holds proprietary rights in the mahal that he is allowed to occupy some of the common land as his *sír*, and he can occupy the *sír* only so long as he continues to be a proprietor in the mahal. It follows that he cannot convey his right of occupancy in this *sír* as something distinct from his proprietary rights in the mahal. In pattidari tenures, however, in which the lands are divided and held in severalty by the different proprietors, and each person managing his own lands, there may be lands which come within the classification of *sír* given in the Rent Act, but they would not seem to be on a different footing from any other land held in severalty by a proprietor.

We can therefore only answer the question which has been referred by saying that it must be determined with reference to the tenure and conditions under which land is held in the mahal by the coparceners, to be ascertained in each case.

BRODHURST, J.—On the reference made to us, I observe that the proprietor of a mahal may acquire *sír*-land for himself, or, on the other hand, possessing such land, he may allow his rights in

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it to lapse. There are, I believe, many estates in which there is no *sír*-land, and there are many landed proprietors who, from their high positions and large means, do not require to hold land as *sír*, and to each of whom the right of becoming an ex-proprietary tenant of such land on the sale of an estate would be of no use or value. It is possible, though scarcely probable, that a proprietor of a mahal might desire to sell his *sir*-land without having any intention of selling the rest of the land of his estate, or he might desire first to sell the *sír*-land, and subsequently to sell the remainder of the estate, because he could not, owing to his circumstances, actually become an ex-proprietary tenant, and therefore wished to sell his estate without reserving any rights, and thus obtain its full value.

The provisions of s. 7 of the Rent Act apply only to such land as is held by the proprietor as *sír* at the time that he loses or parts with his proprietary rights in the mahal.

As I have already observed, a proprietor of an estate may allow his rights in *sír*-land to lapse, and, so long as a person is the sole proprietor of a mahal, he is not, so far as I am aware, restrained by any law from effecting a sale of his proprietary rights in his *sír*-land, even though he retains proprietary possession of the whole of the other lands of the mahal; and I concur with my brother Oldfield that the question must be determined in each case with reference to the tenure and conditions under which land is held in the mahal.

MAHMOOD, J.—The question raised by this reference, as amended in the Full Bench, is whether the proprietary rights of one joint co-sharer in the *sír* of a *mahal* are distinct and separate from the proprietary rights in the mahal itself, so as to enable the owner of one share to sell and give possession of his *sír* alone as against his co-sharers. The question which has been so formulated seems to me to be a complex one, and, from my point of view, cannot be answered as *a whole* either in the affirmative or in the negative, because it involves more than one logical proposition. I will therefore deal with the question under two distinct heads—the *first*, relating to the nature of the proprietary rights which the co-sharers of a zamindari mahal hold in their *sír*-lands, and the *second* regarding their rights of possession of such lands. These

two aspects of the question cannot, in my opinion, be mixed up together, because the rules of our law preclude such a course.

As to the *first* point, I am of opinion that the matter depends upon a full appreciation of the *zamindari* right in these Provinces in mahals, where, there being more than one proprietor, partition of the lands has not taken place. In my judgment in the case of *Sahib Ram* v. *Kishen Singh* (1), which was heard by a Full Bench of this Court, but which unfortunately has not been reported in the Indian Law Reports, I endeavoured at some length to explain my conceptions of the zamindari rights in a *mahal* in these Provinces. That case related to the rights of the co-sharers in the *abadi* area of a mahal, but the *ratio decidendi* adopted by me in that case is fully applicable in principles to *sír*-lands also. A contrary view of the law was taken by a Division Bench of this Court in *Hazari Lal* v. *Ugrah Rai* (2) in which it was held that the *sír*-land of a co-sharer in the mahal did not constitute a part and parcel of his proprietary rights, so as to render the sale of such *sír*-land a basis of the exercise of the pre-emptive right under the *wajib-ul-arz* With due deference to the learned Judges who laid down the rule, I confess I have never been able to adopt the ruling. In *bhaiyachari* villages, where no partition has taken place among the co-sharers, the share of each co-sharer is represented only by the extent of land which he occupies or cultivates as his *sír*, and, this being so, the ruling just referred to would lead to the necessary conclusion that in such a village, notwithstanding a pre-emptive clause in the *wajib-ul-arz*, no right of pre-emption can prevail at all, because, *ex hypothesi*, the co-sharer selling his share does nothing more or less than sell his *sír*-land and his share in the *abadi* area. The anomaly (to say the least of it) of such a proposition is obvious, and without repeating all that I said in the case of *Sahib Ram* v. *Kishen Singh* (1), I will only say that I do not understand the law in such a sense. In a joint coparcenary of co-sharers in a zamindari mahal in these Provinces, the rights of each co-sharers are no doubt joint in the whole *mahal*, so long as there is no partition. But it is equally clear that these joint rights are subject to the incidents of the nature of the zamindari tenure itself. Among such incidents is the circumstance that

(1) Weekly Notes, 1882, p. 192. (2) Weekly Notes, 1884, p. 103.

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a joint co-sharer may have a house of his own upon the joint *abadi* land, or that he may have possession of specific lands which he cultivates as his *sir*. So long as there is no partition between the various co-sharers, the *abadi* land upon which the house of a co-sharer is situate, as well as the specific lands which he holds as his *sír*, forms part of the joint property of the co-sharers of the *mahal*, equally responsible for payment of Government revenue, equally subject to the process called "partition" in the Revenue Law. These are the incidents of the tenure itself, and, so long as there is no partition, none of the joint co-sharers can oust another co-sharer from his *sír*-land, any more than he could oust him from his house in the *abadi* area. And I take it as a simple proposition of the law regulating zamindari tenure in these Provinces, that a joint co-sharer could by sale convey to the vendee his proprietary rights in his house and the land on which it stands, subject of course to the incidents of the tenure itself. That the sale would be valid, so as to convey proprietary rights to such a purchaser in the specific lands upon which the house stands, cannot be doubted, and I am unaware of any reason why the same rule should not apply to *sír*-lands. The reason of the rule is very simple. Property which is originally joint in its nature may be specifically held by the common consent of all the co-sharers in such a manner as to entitle each co-sharer to hold specific lands. When such an arrangement, *consensu omnium*, is arrived at to its fullest extent regarding the cultivated area of the mahal, the zamindari tenure becomes, as I said before, a *bhaiyachari* tenure, because the lands occupied or cultivated by each co-sharer as his *sír* represent his share in the profits of the mahal. But when such an arrangement is not carried out to its full extent, and a sharer cultivates an area of land far less than the area which would represent his share in the mahal, such land as the co-sharer cultivates himself is called his *sír*, the profits whereof are taken into account in the *tujharat*, or the annual division of profits among the co-sharers.

Now there is no doubt in my mind that the *sír*-land of a co-sharer necessarily forms a part and parcel of his proprietary rights in the mahal as much as the land upon which his house stands. He originally held the right jointly with the other co-sharers in the land, which may either form the site of his house or constitute

the area of his *sír*-land; but the moment he is allowed, *consensu omnium*, to build his house on joint land, or to cultivate any particular field, that which was joint and unspecified becomes definite and specified, the specific land so utilized by him being of course regarded as going to specify certain areas as forming part of his share in the joint mahal. The law respects such arrangements in the sense in which I have interpreted them, because the only process by which joint lands in a zamindari mahal can be divided so as to allot specific lands to each co-sharer is the process of partition as defined in s. 107 of the Land Revenue Act (XIX of 1873). S. 108 of the same enactment describes the persons who are entitled to claim perfect partition, and among such persons are included those who are entitled to "specific lands" in a mahal. But the provisions of the law which have an immediate bearing upon the particular question which I am now considering are contained in s. 125 of the Land Revenue Act, which lays down that in carrying out a partition "no *sír*-land belonging to any co-sharer shall be included in the mahal assigned on partition to another co-sharer, unless with the consent of the co-sharer who cultivates it, or unless the partition cannot otherwise be conveniently carried out." This shows that the right of a co-sharer in a joint zamindari mahal in his *sír*-land is sufficiently specific to save it from being confused with the rest of his rights in the mahal, even when a perfect partition takes place. For these reasons I hold that *sír*-lands of a joint co-sharer in a mahal form an essential part of his proprietary rights in the mahal, and that he can sell his proprietary rights in such lands much in the same manner as he could have sold the whole of his share, for, in the matter of transfer by sale, what he could do with the whole, he could do with the part.

I now proceed to consider the second proposition involved in the question, namely, whether the sale of his proprietary rights in his *sír*-lands by a joint co-sharer in a zamindari mahal would confer upon the vendee the right of obtaining actual possession of such lands. Upon this point I am of opinion that the Full Bench ruling of this Court in *Gulab Rai* v. *Indar Singh* (1) furnishes a full answer. S. 7 of the Rent Act (XII of 1881) is intended to confer by statutory provisions fixity of tenure as occupancy-tenants

(1) I. L. R., 6 All. 54.

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upon persons who, being proprietors at the time and holding *sír*-land, lose or part with their proprietary rights in the mahal. Such ex-proprietary right of occupancy relates only to *sír*-lands as defined in cl. (4) of s. 3 of the Rent Act, and it follows that when a co-sharer divests himself of his proprietary rights in such lands, he becomes, *ipso facto*, an occupancy-tenant of such lands within the meaning of s. 7 of the Rent Act, and when such occupancy tenure is established, it cannot be transferred in contravention of s. 9 of the Act, notwithstanding any covenants made in the deed of sale. The obvious policy of the law is to save peasant proprietors in these Provinces from the consequences of their own imprudence, and that policy would be defeated if *sír*-land could be sold in such a manner as to operate in defeasance of the ex-proprietary right of occupancy in such lands. The reason of the rule which applies to the loss or the parting with of proprietary rights in the co-sharer's whole share in the mahal, applies also to a part of such share, so far as the present question is concerned. A co-sharer in a mahal could of course relinquish his *sír* land, and reduce it to lands held by ordinary tenants; but no such question of relinquishment arises in this case, and I need not consider it. The effect of the sale of proprietary rights in *sír*-land would enable the purchaser to claim rent from his vendor as an ex-proprietary tenant, such rent to be taken into account in the annual division of profits, and in the reduction of the share of the vendor if he continues to have a share in the mahal. But beyond this the sale of proprietary rights in *sír*-land can have no effect, and would not entitle the purchaser to any such possession as would defeat the fixity of ex-proprietary tenure at which the provisions of ss. 7 and 9 of the Rent Act clearly aim. This view accords with my judgment in *Tirmal Singh* v. *Bhola Singh* (1).

My answer to the reference therefore is, that the proprietary rights of a joint co-sharer in his *sír*-land form an essential part of his rights in the mahal, that such proprietary rights in the *sir*-land may be sold, but that the purchaser under such a sale could not obtain any such possession as would operate in defeasance of the ex-proprietary right in such *sir*-land conferred by s. 7 and secured by s. 9 of the Rent Act.

(1) Weekly Notes, 1884, p. 169.

APPELLATE CIVIL.

1885
March 21.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

RAMCHHAIBAR MISR (JUDGMENT-DEBTOR) *v.* BECHU BHAGAT AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Material irregularity in publishing or conducting sale—Objection that property sold was not legally saleable—Civil Procedure Code, ss. 244, 311, 312.

An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of sale was not legally saleable, is not a matter which can be entertained by the Court under s. 311 of the Civil Procedure Code, so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it. *Ram Gopal* v. *Khiali Ram* (1) and *Janki Singh* v. *Abläkh Singh* (2) distinguished.

Per MAHMOOD, J.—The scope of s. 244 of the Civil Procedure Code is limited to matters connected with the execution of the decree between the decree-holder and the judgment-debtor, and covers all the questions which may arise between the decree-holder and the judgment-debtor relating to the execution etc. of the decree. Questions that may arise after the sale are not, strictly speaking, questions relating to the execution, discharge, or satisfaction of the decree, within the meaning of cl. (3), s. 244; but, as soon as there has been a sale, the execution of the decree, so far as the decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree.

Also *per* MAHMOOD, J.—The expression "conducting the sale" as used in s. 311 of the Civil Procedure Code, does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale, and not to anything done antecedent to the order of sale. *Olpherts* v. *Mahabir Pershad* (3) referred to.

The facts of this case are stated in the judgment of Oldfield, J.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Munshi *Sukh Ram*, for the respondents.

OLDFIELD, J.—Bechu Bhagat, respondent, held a decree against Ramchhaibar Misr, of the 26th July, 1879, and attached and brought to sale the property in suit, which was purchased by Tilak Dhari, respondent. Ramchhaibar Misr, the judgment-debtor, preferred no objection to the attachment of the property, but, after the sale had taken place, he put in an application under s. 311 to set aside the sale on the ground of irregularity in pub-

* First Appeal No. 146 of 1884, from an order of Munshi Kulwant Prasad, Munsif of Balia, dated the 9th August, 1884.

(1) I. L. R., 6 All. 448. (2) I. L. R., 6 All. 393.
(3) L. R., 10 Ind. Ap. 25.

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lishing and conducting it, and also on the further ground that the property was a right-of occupancy tenure and not saleable by law. All the objections were disallowed, and the sale was confirmed, and this appeal is from the order under s. 312 confirming the sale, and the ground taken before us in appeal for setting aside the sale is the last of the above-named objections, namely, that the property was not saleable. In my opinion this is not an objection of a nature which can be entertained by the Court under s. 311, Civil Procedure Code, so as to afford a ground for setting aside a sale. When a sale has taken place in execution of a decree, the law allows a judgment-debtor, or any person whose immoveable property has been sold, to apply to set aside the sale on the ground of a material irregularity in publishing or conducting it (s. 311), and, under s. 312, it becomes the duty of the Court to confirm the sale, as regards the parties to the suit and the purchaser, if no such application as is mentioned in s. 311 has been made, or if, having been made, the objection has been disallowed. Now the objection here taken is not of the nature contemplated in s. 311: it is an objection that the property attached and sold is not by law saleable: that is not an objection relating to material irregularity in publishing and conducting a sale to which s. 311 refers. It is an objection which the judgment-debtor might have taken at the time of attachment prior to the sale, but it is not one he can take after the sale under s. 311, so as to afford aground under s. 312 for setting aside the sale. We cannot therefore hold that the order confirming the sale from which this appeal is preferred was an improper order, as it was the duty of the Court to confirm the sale, whereas in this case all objections which could properly be preferred under s. 311 have been disallowed.

We have been referred to the case of *Ram Gopal* v. *Khiali Ram* (1) but it contains nothing opposed to the view here taken. That was a suit brought by a judgment-debtor against his decree-holder and a purchaser to set aside a sale, on the ground that the property, being a right of occupancy tenure, was unsaleable, and all that was held was that, as against the decree-holder, the judgment-debtor's proper remedy was not by suit, but under s. 244, Civil Procedure Code, in the execution department, which is also

(1) I. L. R., 6 All. 448.

what I have indicated here, that is, before the sale has taken place, but not by application under s. 311 after the sale to set the sale aside.

In the same way there is nothing in the case of *Janki Singh* v. *Ablakh Singh* (1) which is opposed to the view I here take. On these grounds, and without going into the merits of the objection, I would dismiss the appeal with costs.

MAHMOOD, J.—I am of the same opinion. It appears to me that in construing and interpreting the law on this question, it is important to bear in mind the order in which the various sections which indicate the agitation or adjudication of points in discussion follow each other. The Code itself seems to me to be very clear. After having dealt with the rules for institution and frame of suits, their trial and modes of recording evidence, and the preparation of decrees, in the first eighteen chapters, chapter XIX deals with an entirely different class of procedure, namely, "the execution of decree." This heading, which is general, is divided into many sub-divisions. Sub-division *A* points out the Court by which decrees may be executed; sub-division *B* deals with applications for execution; *C* relates to stay of execution; and sub-division *D* deals with questions for the Court executing decrees. The whole of this last sub-division consists of one section, 244, and I here wish to express my views with regard to the clause. I think the scope of this section is limited to matters connected with the execution of the decree between the decree-holder and the judgment-debtor. In this light, cl. (*c*), which has been in some cases interpreted in a broader sense than we have done in this case, relates to disputes arising between the decree-holder and judgment-debtor strictly. Now, sub-division *E* deals with the mode of executing decrees. This sub-division ends with s. 265, where sub-division *F* begins, which relates to attachment of property. We then come to another part of the same chapter, namely sub-division *G*, which regulates the sale and delivery of property in execution. This sub-division is further sub-divided into smaller sub-divisions, thus:— (*a*) is on the general rules as to sales; (*b*) gives the rules as to the sale of moveable property, and (*c*) gives the rules as to the sale of immoveable property. It is with this last sub-division (*c*) that we are especially concerned, because it is

(1) I. L. R., 6 All. 393.

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in this part of the Code that ss. 311 and 312 occur, and the position which the sub-division (c) occupies in the Code is to be specially borne in mind. It is not necessary to deal further with the order in which the sub-divisions are arranged. I now deal with ss. 244, 311, and 312, which are the important sections in the case. I take it, that when execution of a decree is prayed for by a decree-holder, all the questions which may arise between the decree-holder and the judgment-debtor relating to the execution, *&c.*, of the decree, may be disposed of under s 244. There may be questions relating to the validity of attachment, the mode of execution, *&c*, but when one and all of these matters do terminate in a sale, I maintain that all that is comprehended within the definition of "execution" comes to an end there, because the purchaser comes as a third party, and is not bound by s. 244 as to proceedings antecedent to sale. The "execution" so far as s 241 is concerned, is over, and the questions that may arise *after the sale* are no more, strictly speaking, questions relating to the execution, discharge or satisfaction of the decree within the meaning of cl. (c), s. 244. As soon as there is a sale, the execution of the decree, so far as the decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree. In a recent case I have expressed the view that, under certain conditions, a judgment-debtor may bring a suit to set aside a sale, and, when those conditions exist, there is nothing in s. 244 to bar such suit, even though the plaintiff be a judgment-debtor. Two rulings have been cited before us on behalf of the appellant. The first is *Ram Gopal* v. *Khiali Ram* (1). To this ruling my brother Oldfield was a party. For the reasons given by my brother Oldfield, this ruling is distinguishable from the present case. The other ruling cited is *Janki Singh* v. *Ablakh Singh* (2). So far as the report goes, the ruling is opposed to the view taken by us, and I am not disposed to agree in that ruling, which, however, in some respects, is distinguishable from this case. The real question here is, whether the scope of s. 311 can be regarded as allowing the judgment-debtor, after the sale has actually taken place, to agitate the question of the non-saleability

(1) I. L. R., 6 All. 448. (2) I L R, 6 All. 393.

of the rights which were attached, proclaimed for sale, and actually sold. The learned pleader for the appellant has argued that the words "*in conducting the sale*," as they occur in the section, include all matters antecedent to the sale which would render the sale valid. I cannot accept this condition. If such a principle could be accepted, questions as to the validity of the decree, or to the jurisdiction of the Court by whom the decree was passed, might be re-opened by an application under s. 311. It is against the policy of the Legislature that such questions should be re-opened at such a late stage. Now, I take it that the word "*conducting*," as used in s. 311, does not include any proceedings unconnected with the actual carrying out of the sale. The word has been used in s. 286, which runs as follows :—"Sales in execution of decrees shall be *conducted* by an officer of the Court, or by any other person whom the Court may appoint." This section occurs in sub-division *G* ("*of sale and delivery of property*"), in which sub-division s. 311 also occurs.

Now, reading the word "*conducting*" as it occurs in s. 311, together with the word "*conducted*" in s. 286, it is clear that this word refers only to the action of the officer who makes the sale. Anything done antecedent to the order of sale has nothing to do with "*conducting*" the sale. The learned pleader again contended that "*publishing*" a non-saleable thing as saleable is an irregularity in "*publishing*" the sale within the meaning of s. 311 of the Code. With this contention again I cannot agree, and I hold that the matter now agitated does not fall under s. 311, and the order passed under s. 312 cannot be impugned in this manner. It follows that the suit to set aside this order would not be barred under s. 244 of the Code or s. 312, because, in order to set aside an execution-sale under s. 311, there must have been an irregularity in conducting or publishing it. The exact point now raised before us was not raised in the case of *Olpherts* v. *Mahabir Pershad Singh* (1), but the whole judgment of their Lordships of the Privy Council proceeds upon a reasoning consistent with that which we have adopted in arriving at our conclusion in this case.

I would dismiss this appeal with costs.

Appeal dismissed.

(3) L. R, 10 Ind. Ap. 25.

1885
March 21.

EXTRAORDINARY ORIGINAL CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* JAGRUP AND ANOTHER.

Act I of 1872 (*Evidence Act*) *ss.* 26, 30—"*Confession.*"

The word "confession" as used in the sections of the Evidence Act relating to confessions must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt.

IN this case, which was tried at the Criminal Sessions of the High Court before Straight, J. and a jury, two persons, named Jagrup and Sheru, were charged with the murder of a boy named Hargo Lal. The prosecution proposed to put in evidence the following statement which had been made by the prisoner Jagrup :—

"On the 8th September, at 1884, 11 A. M., I came up from the *khada* (wood-yard) to drink water at the well near the "*Compass Ghar*," (Mathematical Instrument Factory). Ganesh, Brahman, gave me to drink water ; having drunk, I was going to my place in the *khada*. I saw beneath the *Compass Ghar* Sheru talking with the deceased boy Hargo Lal. I went away to my place after seeing this. After 11 A.M., I was sitting at my place on the wood-stack, and saw the following men sitting in the shade beneath a tree, *viz.*, Narain, Ram Dhani and Ram Adhin. At that time Sheru came to the west drain, and called out to me :— "Come quickly, Jagrup, a *biscobra* has appeared. I went to him, and he took me to a wood-stack near the *nim* tree. I saw that the boy Hargo Lal also was present with a piece of wood in his hand. Then in my presence Sheru seized the boy by the neck, and began to strangle him, and throwing him on the ground, sat on his chest. I caught hold of the boy's feet, and said to Sheru :—"Why are you killing the boy? Don't kill him." On this Sheru replied :—"Whom are you trying to stop? Keep silence." Sheru did not mind me, and killed the boy. When the boy's breathing ceased, he let him go. When Sheru had hold of the boy's neck, and was sitting on his chest, the following persons saw it and went away, *viz.*, Narain, Ram Dhani and Ram Adhin. When the boy was dead, I and Sheru took up the corpse and put it by the wood-stack, and I and Sheru put pieces of timber on the boy's body. One gold earring and one silver armlet Sheru gave me, and I took them and went home at evening.

Sheru took for himself one silver armlet, one gold earring, and one silver ring."

STRAIGHT, J., ruled that the prisoner Jagrup, at the time when he made the above statement, was in the custody of the police.

Mr. *A. Strachey*, for the prisoner, objected to the statement being received in evidence, on the ground that it was a confession within the meaning of s. 26 of the Evidence Act. He contended that the word "confession" as used in the Act must be understood as including, not merely admissions of guilt, but also admissions of any incriminating circumstances from which the inference might be drawn that the person making such an admission was guilty of the crime charged against him. In support of this contention, he referred to the definition of the word "confession" in Stephen's *Digest of the Law of Evidence*, art. 21, and to the cases of *Queen* v. *Bakur Khan* (1), *Imperatrix* v. *Pandharinath* (2), and *Queen-Empress* v. *Mathews* (3).

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown, contended that the statement did not amount to a "confession," and that the meaning of the term should not be extended to any admission falling short of an admission of guilt. He cited *Empress* v. *Dabee Pershad* (4).

STRAIGHT, J.—It has been argued by the learned counsel for the prisoner Jagrup, that the statement made by the prisoner on the 22nd September, 1884, was a "confession" within the meaning of the Evidence Act, and, having been made while the accused was virtually in custody of the police, is inadmissible in evidence against him. In support of this contention, the definition of the term "confession" in Mr. Justice Stephen's *Digest of the Law of Evidence* has been referred to; and Mr. Justice Stephen is an authority to whom the greatest respect is due, not only as a distinguished English Judge, but also as an eminent jurist who, moreover, had a considerable hand in framing some of our most important codes in this country. The work, however, which has been cited was if I remember aright, written in view of a proposal for preparing a Code of Evidence for England, and it can acarce-

(1) N.-W. P. H. C. Rep. 1873, p. 213.
(2) I. L. R., 6 Bom. 34.
(3) I. L. R., 10 Calc 1022.
(4) I. L. R., 6 Calc. 530.

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ly be regarded therefore as an authority to guide me in construing an Act passed by the Legislature of this country in 1872, though I may add that I do not find anything in Mr. Justice Stephen's definition at variance with the view I take. In the present case I do not feel called upon to decide more than the question whether or not this particular statement is admissible in evidence. I am of opinion that it does not constitute a "confession" within the meaning of the Evidence Act. It must be looked at as a whole, and it would not be right to take isolated portions of it, and to consider whether any of them, regarded separately, amounts to an admission of guilt or not, though it is clear that they do not. It is conceded by Mr. Hill, and even by Mr. Strachey, that the word "confession" must be understood in the same sense in all the sections of the Evidence Act which relate to confessions. It must be construed as meaning the same in s. 30 as in ss. 24, 25, and 26. Now, it appears to me that to accept Mr. Strachey's interpretation would lead to this result, and I put it as a *reductio ad absurdum*, that if *A* and *B* were jointly tried for the murder of *C*, and it was proved that *A* said he was passing along a road, the scene of the murder, about the time *C* was murdered, upon the strength of such statement anything else he might have said implicating *B* might be taken into consideration against *B* as a confession made by *A*. I cannot think that this was ever intended by the Legislature What was intended was, that where a prisoner—to use a popular phrase—"makes a clean breast of it," and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word "confession" in s. 30 cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt. It must not, therefore, in my opinion, be so construed in the other sections relating to confessions.

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In the present case, looking at the statement of the prisoner Jagrup as a whole, I am of opinion that it does not amount to a confession, and is indeed no more than a statement by a person who admits that he witnessed the perpetration of a crime, but denies having participated in it, and alleges that he protested against it.

FULL BENCH.

1885 April 1.

Before Sir W. Comer Petheram Kt., Chief Justice, Mr Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr Justice Mahmood.

NIVATH SINGH (PLAINTIFF) *v.* BHIKKI SINGH (DEFENDANT).*

BHIKKI SINGH (DEFENDANT) *v.* NIVATH SINGH (PLAINTIFF) *

Civil Procedure Code, s. 584—Second appeal—Grounds impugning findings of fact.

Held by the Full Bench (PETHERAM, C. J., dissenting) that, under s. 584 (*c*) of the Civil Procedure Code, it is competent for the High Court to entertain pleas in second appeals which impeach the findings of fact recorded by the lower appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived

Where a lower appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has stated no intelligible reasons for arriving at its findings of facts, the High Court may take notice of all such matters in second appeal. *Futtehma Begum* v. *Mohamed Ausur* (1), *Assanullah* v. *Hafiz Mahomed Ali* (2), and *Lal Mahomed Bepari* v. *Shoila Bewa* (3) referred to.

Per PETHERAM, C J —The High Court is not at liberty in second appeal to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly, inasmuch as no question of fact is included in the grounds of appeal allowed by s. 584 of the Civil Procedure Code, and it would seem that the intention of the Legislature was that in small causes the findings of the lower Courts on questions of fact should be absolutely final.

By "specified law" in clause (*a*) of s. 584 is meant the statute law, and by "usage having the force of law" the common or customary law of the country or community, and the clause is confined to cases in which the lower appellate Courts have either misconstrued a statute or written document, or have come to a wrong conclusion as to what is the customary law of the country or community with

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* Second Appeals Nos. 169 and 305 of 1884, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 20th December, 1883, modifying a decree of Shiakh Asghar Ali, Munsif of Deoria, dated the 7th September, 1883.

(1) I. L. R., 9 Calc. 309
(2) I. L. R, 10 Calc. 932.
(3) 11 Calc. L. Rep. 104.

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reference to questions at issue between the parties. Clause (*b*) can only refer to mistakes in law, and does not extend the operation of clause (*a*). The term "procedure" in clause (*c*) means the practice followed by the Courts in the trial of cases, and cannot be construed as including the mental process by which a Court comes to a conclusion upon a question of fact.

Per MAHMOOD, J.—That the Legislature, by framing s. 574 of the Civil Procedure Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal; and a judgment of a Court of first appeal which falls short of due compliance with the various clauses of s. 574 is essentially defective, and may properly be made the subject of complaint in second appeal under s. 584. *Ramnarain* v. *Bhawanidin* (1) and *Sheoambar Singh* v. *Lallu Singh* (2) referred to.

The word "procedure" in clause (*c*) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code or any other law regulating the investigation of cases by the civil Courts.

When the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, when the Court of first appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the lower appellate Court open to second appeal under cl. (*c*) of s. 584, so long as the error was substantial enough to have possibly affected the justice of the case upon the merits.

THE suit to which these appeals related was one to enforce a right of pre-emption in respect of the sale of a one pie share in each of two villages, by a deed dated the 23rd December, 1882. The sale-consideration was stated in the deed to be Rs. 999, made up as follows:—the amount of a bond for Rs. 697, with interest, Rs. 899-1-0; Rs. 72-15-0, due on an old account; and Rs. 27 paid in cash. The plaintiff alleged in his plaint that the statement in the deed that the sale consideration was Rs. 999 was false, and that the real price of the property was Rs. 377. The Court of first instance gave the plaintiff a decree for possession of the property, on pay-

(1) Weekly Notes, 1882, p. 104. (2) Weekly Notes, 1882, p. 158.

ment of Rs. 999, which sum it found was the real price. The plaintiff appealed from this decree, his appeal being virtually confined to the finding as to the amount of the sale-consideration. The lower appellate Court stated the question requiring its decision in the following terms:—"The point for determination is, what is the actual amount of the purchase-money?" Upon this point it found as follows:—

"The sale-deed contains a detail as follows:—A bond, dated the 8th December 1877, for Rs. 697, with interest, Rs. 899-1-0; Rs. 72-15-0 former debt, and Rs. 27 cash. The plaintiff also states that the amount of the *zar-i-peshgi* lease is Rs. 350; hence it is necessary to examine the account of the former bond. That bond was not duly proved, nor was the money thereof paid in cash. Its detail is as follows:—Rs. 347 on account of *zar-i-peshgi* lease, dated 5th Baisakh badi 1279 fasli, Rs. 51 on account of the bond, dated 12th Jaith badi 1281 fasli, Rs. 127 of the account and Rs. 172 cash. In my opinion, Rs. 347 on account of *zar-i-peshgi* lease, and Rs. 51 on account of bond, total Rs. 398, are proper, and the items of Rs. 172 cash and Rs. 127 of account are wrong, inasmuch as these two items are simply for show. As the defendant was lease-holder from before, and had a mind to purchase the property, he used to take paper proceedings, otherwise no person can think that a property paying Rs. 4-8-0 as revenue will be worth Rs. 999. The plaintiff should pay Rs. 398, and the interest up to the date of the sale-deed to the extent of Rs. 120, total Rs. 518, and Rs. 27 now paid in cash; in all Rs. 545. The amount of Rs. 72-15-0 is also nominal." The lower appellate Court accordingly modified the decree of the first Court by decreeing the plaintiff's claim to possession on payment of Rs. 545 instead of Rs. 999.

Both the plaintiff and the defendant vendee appealed to the High Court. The grounds on which the defendant vendee appealed were as follows:—

"(i) Because the lower Court has erred in deciding the case on conjectural grounds and ignoring the whole evidence.

"(ii) Because the lower Court has erred in reducing the amount covered by the registered bond of the 8th December, 1877.

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"(iii) Because the lower Court has assigned no reasons for disallowing the item of Rs. 72-15-0."

The ground on which the plaintiff appealed was as follows:—

"Because the lower appellate Court has erred in law in awarding the sum of Rs. 168 compound interest, including other sums not lawfully due by the vendor to the respondent vendee of the share in suit."

The appeals were numbered respectively 169 of 1884 and 305 of 1884.

The Divisional Bench (PETHERAM, C. J., and BRODHURST, J.), before which the appeal came for hearing, referred to the Full Bench the following question:—"Whether the questions raised in these two cases can be made the subject of second appeals?"

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Mr. *J. Simeon*, for the respondent, in No. 169.

Mr. *J. Simeon*, for the appellant,

Pandit *Ajudhia Nath* and *Kashi Prasad*, for the respondent, in No. 305.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—The question raised by this reference is, whether this Court is at liberty, in second appeal, to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly.

I am of opinion that the question must be answered in the negative. I am aware that this opinion differs from many rulings of the High Courts in India, and from that of my brother Judges, but as I think the words of the statute are clear, and that if they are liable to create injustice, the remedy should be applied by the Legislature, I feel it to be my duty to disagree with the many authorities which I have mentioned. S. 585 of the Civil Procedure Code provides that no second appeal shall lie except on the grounds mentioned in s. 584, so that the question resolves itself into one of the construction of that section, and of that section alone. There are only three grounds of appeal mentioned in it, and it will be as well to examine them in detail.

(A) The decision being contrary to some specified law or usage having the force of law. By "specified law," the Legislature would seem to mean the statute law, and by "usage having the force of law" the common or customary law of the country or community, and, in my opinion, the ground is confined to cases in which the lower appellate Courts have either misconstrued a statute or a written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties.

(B) The decision having failed to determine some material issue of law or usage having the force of law. The meaning of this is very obscure, but, whatever it means, it can only refer to mistakes in law Probably it was intended to meet cases in which the lower Courts had treated the question as one of fact, when it was really one of law, but my opinion is that it does not extend the operation of (A) and is included in it.

(C) A substantial error or defect in the procedure as prescribed by the Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits. Procedure is a perfectly well known word among lawyers, and means the practice followed by the Courts in the trial of cases which come before them ; but, until it became necessary for the purpose of extending second appeals under the Code to questions of fact, I am not aware that the mental process by which a Judge and Jury came to a conclusion on a question of fact was ever called a matter of procedure, and, in my opinion, it is impossible to fix that meaning to the word.

This being my view of the meaning of the grounds of appeal provided by s. 584, it of course follows that no question of fact is included in either of them, and it would seem that the intention of the Legislature was that in small causes the finding of the lower Courts on questions of fact should be absolutely final; and, having regard to the fact that forty per cent. of the second appeals filed in the High Court relate to property of less value than Rs 100, I cannot but think that the provision was a wise one. If a remedy is needed, the most useful one would probably be to abolish second appeals altogether, and to reduce the amount above which a first appeal would lie to the High Court to a much smaller sum than Rs. 5,000; but, if this were done, all appeals which did not come

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to the High Court ought, of course, to be heard by the District Judge.

STRAIGHT, OLDFIELD, and BRODHURST, JJ.—The question raised by this reference is, whether it is competent for this Court to entertain pleas in second appeals which impeach the findings of fact recorded by the lower appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Assuming these allegations to be sustained, we are of opinion that our answer should be in the affirmative. By s. 584 of the Civil Procedure Code, it is provided that an appeal lies to this Court from an appellate decree when, among other matters, there has been "a substantial error or defect in the procedure prescribed by this Code or any other law, which may possibly have produced error or defect in the decision on the merits;" and by s. 574 it is enacted that the judgment of a first appellate Court shall contain "the reasons for the decision." We think that where a lower appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has perversely interpreted or shut its eyes to proved facts, or has stated no intelligible reasons for arriving at its findings of facts, this Court may take notice of all such matters in second appeal. Such has long been the view of this Court, as numerous rulings will show, and the same view has been held at Calcutta—*Futtehma Begum* v. *Mohamed Ausur* (1), *Assanullah* v. *Hafiz Mahomed Ali* (2), and *Lal Mahomed Bepari* v. *Shoila Bewa* (3). In the first of these cases Wilson, J., remarks :—"We are well within the scope of the authorities in holding that where the lower appellate Court has clearly misapprehended what the evidence before it was, and thus has been led to discard or not give sufficient weight to important evidence to which it is not entitled, and has thus been led, not into any mere incidental mistake, but totally to misconceive the case, this Court may interfere." It seems to us that if the judgment of a lower appellate Court is marked by the defects we have already adverted

(1) I. L. R., 9 Calc 309. (3) 11 Calc. L. Rep. 104.
(2) I. L. R., 10 Calc. 932.

to, there have been defects in its procedure, which not only possibly but probably have produced error or defect in the decision of the appeal on its merits; or, in other words, that there has been no legal trial or determination of the appeal. For the expression "determine any question of fact," as used in section 566 of the Code must, we take it, be construed to mean "determine any question of fact in a legal manner," that is to say, by the Court exercising its judicial mind in a rational and legal manner, and not deciding out of mere caprice or a perverse and obtuse interpretation of evidence. If this Court had not the power in second appeal we hold it has, to remand a case to a lower appellate Court for the preparation of a legal judgment properly determining the question or questions of fact, we know by experience that great injustice might often be done, and it would come to this,—that we should be bound by the mere *ipse dixit* of a lower appellate Court in respect of the issues of fact, no matter how preposterous its findings might be. We cannot believe it was ever intended by the Legislature that in a such case there should be an absolute defect of jurisdiction in this Court to examine such findings in second appeal. Our answer to the reference therefore is that the questions raised in S. A. No. 169 of 1884 by the pleas in appeal were questions that might be made the subject of second appeal.

MAHMOOD, J.—In answering the reference in these cases I do not think we are concerned with the merits of the case, because that is a matter which would be disposed of by the Division Bench. Treating the question therefore purely as a matter of interpreting the law, I am of opinion that the grounds of appeal urged in these cases are such as could be entertained in second appeal, provided of course that they arise out of the circumstances of the case.

In considering this matter, the first section to which I would refer is s. 574 of the Civil Procedure Code. The powers conferred by the Code upon the Court of first appeal are very extensive, and in cases which involve no complicated question of law, the decision of that Court is practically final, because it cannot be interfered with by the Court of second appeal, except upon such grounds as fall within the purview of s. 584 of the Code. The conclusions upon the facts of the case at which the Court of first appeal arrives are binding upon the Court of second appeal, because of the pro-

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visions of s. 585 of the Code. This being the effect of the provisions of the law, it seems to me that the Legislature, by framing s. 574 of the Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal. All that I have said so far is based upon the reasoning which I explained in *Ramnarain* v. *Bhawanidin* (1) and in *Sheoambar Singh* v. *Lallu Singh* (2), and which I need not repeat here. It is, however, a necessary corollary of the *ratio decidendi* adopted by me in those cases that a judgment of the Court of first appeal, which falls short of due compliance with the various clauses of s. 574, is essentially defective, and that such defect could properly be made the subject of complaint in second appeal within the purview of s. 584 of the Code. And it seems to me that any other view of the law would either render s. 574 inconsistent with s. 584, or reduce the former section to a mere superfluity or dead letter. I make this observation, subject of course to the effect which the provisions of s. 578 (read with s. 587) have upon the powers of the Court of second appeal, but we are not immediately concerned with that section in answering this reference.

The most important section of the Code to be considered for the purpose of this reference is naturally s. 584, which corresponds with s. 372 of the old Code (Act VIII of 1859), and a comparison of the two sections shows that the provisions of the law have undergone no important change. It is clear that in this case the ground urged in second appeal could not be entertained under either cl. (*a*) or cl. (*b*) of s. 584; but cl. (*c*) of the section seems to me to be wide enough to include such grounds. The clause lays down that a second appeal would lie on the ground of "a substantial error or defect in the procedure as prescribed by his Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits." The corresponding part of s. 372 of the Code of 1859 was very similarly worded, as it gave a right of second appeal on the ground "of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the

(1) Weekly Notes, 1882, p. 104. (2) Weekly Notes, 1882, p. 158.

case upon the merits." The absence of the phrase "*investigation of the case*" in the present section of the Code might lead to the inference that the right of second appeal was intended to be more restricted than it was under the old Code, but, on the other hand, the insertion of the word "*possibly*" would lead to the contrary inference. I am, however, of opinion that the change of language has introduced no material alteration in the law. Investigation, as I understand the word, simply means the process by which conclusions as to the merits of the case are arrived at; procedure means the rules by which that process is to be guided. The one is the subject of the other, and I take it that the law will presume that, where there is no defect of procedure, there is no defect of investigation. It follows therefore that the omission of the phrase "*investigation of the case*" in s. 584 implies no intention on the part of the Legislature to restrict the right of second appeal by rendering it narrower than what it was under the Code of 1859. On the other hand, the introduction of the word "*possibly*" does not go far to show that the present Code intended to extend the right of second appeal.

The reference therefore resolves itself into the simple question whether the grounds of appeal indicate any such substantial error or defect in the "*procedure*" as "may *possibly* have produced error or defect in the decision of the case *upon the merits*." I have emphasized the words which I think have to be considered in deciding the question. In my opinion the word "procedure" as used in cl. (*c*) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code, or any other law regulating the investigation of cases by the Civil Courts. The duties and powers of a Court of first instance in trying a cause are laid down in the Code at full length, and the effect of s. 582 is to render the same rules, *mutatis mutandis*, applicable to the Court of first appeal; and it follows that, upon matters which are common to both the Courts, what would constitute a substantial error or defect in procedure for the Courts of first instance, would also apply in the Court of first appeal. The latter Court not being primarily concerned either with the framing of issues or with taking of evidence in trying those issues, its duties in regard to appeals are limited to matters described in

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s. 574 of the Code, so that when a Court of first appeal fails to consider the point for determination or to give reasons for its decision, its action or rather omission is tantamount to a defective trial of an issue by a Court of first instance. The action of a Court of first appeal in not considering evidence upon any point, or in assigning no reasons for its conclusions, bears a strong analogy to the action of a Court of first instance in declining to frame any issue, or omitting to take evidence upon any issue necessary for a proper decision of the case. Such cases, I think, constitute a substantial defect or error in procedure, introducing the possibility of error or defect in the decision of the case within the meaning of cl. (*c*) of s. 584. And it seems to me that, under any other view, s. 566 of the Code could not be consistently employed by a Court of second appeal for the purpose of remanding issues of fact which it may consider necessary to ascertain for a proper adjudication upon the rights of the parties in second appeals. The uniform practice of this Court, as well as of the other High Courts, so far as I am aware, has been consistent with my view, and indeed the cases cited on behalf of the appellant go even further. The cases of *Lal Mohamed Bepari* v. *Shoila Bewa* (1), *Ram Prosad Das* v. *Rajo Koer* (2), *Huropershad Roy Chowdhry* v. *Umatara Dabi* (3), *Mahesh Singh* v. *Masri Singh* (4), *Behari Lal* v. *Sahu Bithal Das* (5), *Raj Rani Kuari* v. *Manni Sahu* (6), and the older case of *Shoobul Chunder Kulleah* v. *Koylash Chunder Mal* (7), all go to support the contention of the learned pleader for the appellant. But perhaps the strongest case in support of the appellants' contention is *Futtehma Begum* v. *Mohamed Ausur* (8), in which Wilson, J. laid down that in exceptional cases the High Court will interfere in second appeal with findings of fact which have been arrived at by the lower appellate Court under a total misconception of the merits of the case. The latest case, however, is *Assanullah* v. *Hafiz Mahomed Ali* (9), in which Field, J. laid down the rule that where the lower appellate Court omits to give reasons for its decisions, the High Court will retain the case in second appeal,

(1) 11 Calc. L. Rep. 104.
(2) 5 Calc L. Rep. 94.
(3) 8 Calc. L. Rep. 449.
(4) Weekly Notes, 1881, p. 14.
(5) Weekly Notes, 1882, p. 6.
(6) Weekly Notes, 1882, p 66.
(7) 14 W. R. 23.
(8) I. L. R. 9 Calc. 309.
(9) I. L. R. 10 Calc. 932.

and either require the Judge to state his reasons, or, in the event of his absence, refer the question to his successor for fresh trial.

Without discussing the various cases, I wish to say that I am not prepared to go the whole length of the rule laid down in some of them. The application of the provisions of cl. (*c*) of s. 584 of the Civil Procedure Code must necessarily depend in a great measure upon the particular circumstances of each individual case; but I take it as a universal rule, applicable alike to all cases, that in acting under that clause the High Court cannot in second appeal deal with the lower Court's findings of facts as it could have done in first appeals. The law obviously aims at finality of decision upon questions of fact in cases which do not come up to the High Court in first appeal; and I should say that when the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous, or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, where the Court of first appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the lower appellate Court open to second appeal under cl. (*c*) of s. 584, so long as the error is substantial enough to have possibly affected the justice of the case upon the merits. Beyond the rule which I have so endeavoured to enunciate, I am not prepared to go regarding the scope of second appeals, and as illustrating my view I may add that findings of fact which proceed upon no evidence at all, or upon ignoring the whole evidence, or upon erroneous conception of the rules of *onus probandi*, admissions, estoppels, conclusive proof and other such matters

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would, though findings of fact, be open to objection in second appeal.

Applying these principles to the cases to which this reference relates, I am of opinion that if the grounds urged can be substantiated, they form a proper subject of second appeal, and my answer to the reference is therefore in the affirmative.

1885 April 16.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr Justice Brodhurst.

BINDA KUAR (DEFENDANT) v. BHONDA DAS (PLAINTIFF).*

Act IX of 1872 (*Contract Act*) *ss.* 69 70—*Payment of Government revenue by person wrongfully in possession of land.*

B, who was in wrongful possession of land which by right belonged to *K*, collected rents and paid the government revenue. *K* eventually established her title to the property, obtained possession, and recovered the rents from the tenants, and *B* was obliged to refund the same. Subsequently *B* sued *K* to recover the sum which he had paid on account of revenue.

Held that the claim did not fall within the provisons of ss. 69 and 70 of the Contract Act, and the fact that the plaintiff had been a loser by his wrongful act, or that the defendant had been benefited by the payment he made, would give him no right of action against her. *Tiluck Chand* v. *Soudamini Dasi* (1) referred to.

THE facts of this case are sufficiently stated in the judgment of the Court for the purposes of this report.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

OLDFIELD and BRODHURST, JJ.—The plaintiff took wrongful possession of the property of his deceased brother, which by right was the inheritance of the defendant, who ultimately established her title and obtained possession. While the plaintiff held possession he collected rents, and paid the Government revenue on the property. The defendant recovered the rents from the tenants, and the plaintiff was obliged to refund the same, and he now sues defendant to recover the sum he paid on account of revenue. The first

* Second Appeal No. 438 of 1884, from a decree of M. S Howell, Esq., District Judge of Mirzapur, dated the 17th January, 1884, reversing a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 6th July, 1883.

(1) I. L. R., 4 Calc. 566.

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Court dismissed the suit. The lower appellate Court has decreed the claim, and the defendant has appealed. We are of opinion that the appeal must prevail, and the Court of first instance has rightly held that the plaintiff, under the circumstances, has no right of action. The claim does not fall within the provisions of ss. 69 and 70, Contract Act. The plaintiff was in wrongful possession of the defendant's property, and paid the revenue for his own benefit and on his own account, and the fact that he has been a loser by his wrongful act, or that the defendant has been benefited by the payment he made, will give him no right of suit against her. The case of *Tiluck Chand* v. *Soudamini Dási* (1) is very similar, and supports the view we take. We decree the appeal, and set aside the decree of the lower appellate Court, and restore that of the first Court, and dismiss the suit with all costs.

Appeal allowed.

FULL BENCH.

1885 *April* 18.

Before Sir W. Comer Petheram, Kt, Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

CHATTARPAL SINGH (PETITIONER) *v.* RAJA RAM (OPPOSITE PARTY) *.

Suit in formâ pauperis—*Rejection of application—Civil Procedure Code, s.* 407 (*c*)—"*Right to sue*"—*Limitation.*

Where an application for leave to sue as a pauper was rejected with reference to s. 407 (*c*) of the Civil Procedure Code on the ground that the claim was barred by limitation and therefore the applicant had no right to sue,—*held* by the Full Bench that the Court had acted within its powers, and that, its jurisdiction not having been exercised illegally or with material irregularity, the High Court had no power of interference in revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Singh* (2) referred to.

The terms of s. 407 (*c*) of the Code must not be read as limiting the Court's discretion to merely ascertaining whether the "right to sue" arose within its jurisdiction, but have a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of limitation or any other law.

Per MAHMOOD, J.—The word "case" as used in s. 622 of the Civil Procedure Code should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision, subject to the rules governing the exercise of the appellate and revisional jurisdictions respectively; and

* Application No. 270 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of Babu Abinash Chander Banerji, Subordinate Judge of Allahabad, dated the 3rd May, 1884.

(1) I. L. R., 4 Calc., 566. (2) I. L. R, 11 Calc. 6.

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it comprehends adjudications under s. 407, which fall under the same general category of adjudications as the rejection of an ordinary plaint under s. 53 or s. 54. *Phul Singh* v. *Jagan Nath* (1), *Bhulneshri Dat* v. *Bidiadhis* (2), and *Sital Sahu* v. *Bachu Ram* (3) referred to.

Also *per* MAHMOOD, J.—The provisions of s. 407 must be insterpreted strictly, inasmuch as they operate in derogation of the right possessed by every litigant to seek the aid of the Courts of justice; and an exercise of jurisdiction under that section, when such exercise of jurisdiction is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. *Har Prasad* v. *Jafar Ali* (4), and *Ammal* v. *Nayudu* (5) referred to.

THIS was an application to the High Court to revise, under s. 622 of the Civil Procedure Code, an order of the Subordinate Judge of Allahabad, dated the 3rd May, 1884. The applicant, Chattarpal Singh, applied to the Subordinate Judge of Allahabad for leave to sue as a pauper for certain immoveable property. The Subordinate Judge rejected the application with reference to s. 407 (*c*) of the Civil Procedure Code, on the ground that the claim was barred by limitation, and therefore the applicant had no right to sue.

The Divisional Bench (OLDFIELD and MAHMOOD, JJ.) before which the application for revision of this order came for hearing, referred to the Full Bench the question "whether this Court has the power under s. 622, Civil Procedure Code, to revise an order passed under s. 407, Civil Procedure Code, rejecting an application for permission to sue *in formâ pauperis*," citing as cases which might be referred to—*Phul Singh* v. *Jagan Nath* (1), *Bhulneshri Dat* v. *Bidiadhis* (2), *Sital Sahu* v. *Bechu Ram* (3), *Moulvi Muhammad* v. *Syed Husain* (6), and *Amir Hasan Khan* v. *Sheo Baksh Singh* (7).

Babu *Ram Das Chakarbati*, for the applicant.

Mr. *T. Conlan*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Munshi *Ram Prasad*, for the opposite party.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J., and STRAIGHT, OLDFIELD, and BRODHURST, JJ.—It seems to us that the question put by this reference can scarcely be answered generally, and that our reply to it must be

(1) Weekly Notes, 1882, p. 39.
(2) Weekly Notes, 1882, p. 69.
(3) Weekly Notes, 1882, p. 92.
(4) *Ante*, p. 345.
(5) I. L. R., 4 Mad. 323.
(6) I. L. R., 3 All. 203.
(7) I. L. R., 11 Calc. 6.

limited to the particular case out of which it has arisen. Their Lordships of the Privy Council in a recent ruling—*Amir Hassan Khan* v. *Sheo Baksh Singh* (1)—have laid down the following test to be adopted in deciding as to the powers of the High Court under s. 622 of the Civil Procedure Code :—"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity." In the case before us, it is conceded that the Subordinate Judge had jurisdiction to hear the application, that he did hear it, and that he has decided it. It is not enough to give us jurisdiction to revise his order under s. 622, to show that he has decided wrongly, but it must be made out that he acted illegally or with material irregularity. We must therefore look to the sections of Chapter XXVI of the Code, under which the Subordinate Judge's proceedings were taken, to ascertain precisely what his powers were. By s. 403 it is provided that an application for permission to sue as a pauper must be in writing, that it is to contain all the particulars required by s. 50 to be given in ordinary plaints, that it shall be accompanied by a schedule of the petitioner's moveable and immoveable property, with an estimate of its value, and that it must be signed and verified in like manner as a plaint. S. 404 deals with the presentation of the petition, and s. 405 enacts that, if the application is not framed or presented in the manner prescribed, it shall be rejected. S. 406 provides for the examination of the applicant; and then we come to s. 407, which declares the grounds on which, after examination of the applicant, the Court shall reject the application. If none of these grounds appear, in other words, if the applicant makes out satisfactory *primâ facie* grounds for calling on the proposed defendant to show cause against his application, then notices are to issue as provided in s. 408, and they pave the way to the formal hearing mentioned in s. 409, at which the question of the applicant's pauperism has to

(1) I. L. R., 11 Calc. 6.

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be determined. It will thus be observed that the proceedings under ss. 405 and 407 are of a preliminary character, and a rejection under those sections is not, as in the case of s. 409, of a final kind, and a bar to a subsequent application. Examining s. 409 with advertence to the circumstances of the case out of which the reference has arisen, it appears to us that it was competent for the Subordinate Judge to reject the applicant's petition upon the ground that, as from his petition and his examination his cause of action was shown to have arisen "beyond the period of limitation allowed by law for instituting the suit" (s. 50, last para.), his allegations did not "show a right to sue" (s. 407, cl. *c*.). We cannot read these words of s. 407 as limiting the Court's discretion to merely ascertaining whether the "right to sue" arose within its jurisdiction, but they have in our opinion a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of limitation or any other law. If it were not so, then thediscretion of the Court, being limited to the matter of jurisdiction, would be of little value. Whether in the case before us we treat the Subordinate Judge's order as made under s. 407 or s. 405, it appears to us that, he was acting entirely within his powers in holding that the applicant had no right to sue, his cause of action having accrued beyond the period of limitation provided by law for his proper suit. It has therefore not been shown that "he exercised his jurisdiction with illegality or material irregularity," and it follows that we have no jurisdiction to revise his orders under s. 622 of the Code. In these terms we answer the reference.

MAHMOOD, J.—Bearing in mind the rulings referred to by the Division Bench and the course which the argument before the Full Bench has taken, I am of opinion that the question raised by this reference has two distinct aspects; *first*, as a general question, whether orders under s. 407 of the Civil Procedure Code are subject to the revisional jurisdiction conferred upon this Court by s. 622 of the Civil Procedure Code; and *secondly*, whether the circumstances of this particular case furnish grounds for the exercise of such revisional jurisdiction. I will consider each of these points separately.

Upon the first point, relating to the general principle upon which the revisional powers of this Court under s. 622 of the Civil Procedure Code must be exercised, we are of course bound by the ruling of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), and by the recent Full Bench ruling of this Court in *Magni Ram* v. *Jiwa Lal* (2) which simply adopted the rule laid down by the Lords of the Privy Council. I was one of the Judges who concurred in the Full Bench ruling, but finding that the rule therein laid down was interpreted in a manner which was inconsistent with my reasons for concurring in the Full Bench ruling, I took it upon myself in the case of *Har Prasad* v. *Jafar Ali* (3) to explain, at some length, the exact scope of the rule laid down by the Lords of the Privy Council, and which we had unanimously adopted in the Full Bench. I still adhere to the views which I then expressed, and I now pass to the special question whether orders under s. 407 of the Civil Procedure Code, rejecting applications for permission to sue *in formâ pauperis*, can be revised by this Court under s. 622 of the Code. But before expressing my own views upon the matter, I wish to refer to certain rulings which were cited on either side at the hearing. The first of these is the case of *Phul Singh* v. *Jagan Nath* (4) in which a Division Bench of this Court held that an order refusing permission to sue *in formâ pauperis* did not fall within the term "case" in s. 622, and therefore could not be dealt with in revision. The same view appears to have been taken in *Bhulneshri Dat* v. *Bidiadhis* (5), and also in *Sital Sahu* v. *Bechu Ram* (6). It was principally in consequence of these cases that my brother Oldfield and myself made this reference to the Full Bench. The particular circumstances of these cases do not appear from the report, but I confess, and I say this with due deference, that I am unable to concur in the general form in which the rule was laid down in those cases. The word "case," as used in s. 622 of the Code, is nowhere defined; but adopting the general rule of construing statutes, I hold that the word should be understood in its most broadest and most ordinary sense, unless there were specific reasons for narrowing its meaning. I confess I am unaware of any such reasons, and limiting the arguments to orders under

(1) I. L. R., 11 Calc. 6.
(2) *Ante*, p. 336.
(3) *Ante*, p. 345.
(4) Weekly Notes, 1882, p. 39.
(5) Weekly Notes, 1882, p. 69.
(6) Weekly Notes, 1882, p. 92.

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s. 407 of the Civil Procedure Code, I should say as a general proposition that that which might constitute the subject of an appeal would necessarily be a "case." I say this because in the course of the argument it was suggested that the reason why an order rejecting an application under s. 407 was not a "case" within the meaning of s. 622, was that such an order constituted no adjudication, but only a preliminary proceeding taken before the appearance of the opposite party. So far as this argument is concerned, I have only to say that the Code itself provides cases in which adjudications do take place without the presence of the opposite party, and are regarded as adjudications furnishing matter for appeal. I need not refer to the Code at large, but only to such parts of it as afford the strongest analogy to the immediate question which I am now considering. Now s. 407 is a part and parcel of one distinct Chapter—XXVI of the Code—which provides rules for "suits by paupers," and begins with s. 401, which gives the general right to indigent persons to bring suits *in formâ pauperis*, subject of course to the specific rules laid down in the Code. S. 403 provides that the pauper is to seek his remedy by a written application containing "the particulars required by s. 50 in regard to plaints in suits;" s. 404 lays down rules as to presentation of the application; s. 405 gives a summary power to the Court to reject the application if the rules contained in ss. 403 and 404 are not duly observed; s. 406 provides for examination of the applicant "regarding the merits of the claim;" and then comes s. 407, which confers upon the Court the power of rejecting the application after having ascertained the merits of the claim. This power is limited to the conditions prescribed by the various clauses of the section, but the clause with which we are immediately concerned is cl. (*c*), which lays down that one of the grounds for rejecting the application may be that the applicant's allegations do not "show a *right to sue* in such Court." To proceed further with the main features of the rules contained in the Chapter:—S. 408 provides for the service of notice on the opposite party, fixing a day for receiving evidence as to the applicant's pauperism; s. 409 relates to the procedure to be adopted at the hearing; and s. 410 provides that "if the application be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall

proceed in all other respects as a suit instituted under Chapter V." The only other section of the Chapter which I wish to notice is s. 413, which lays down that "an order of refusal made under s. 409 to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue, but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right."

Now, reading these provisions of the law together, there is no doubt in my mind that the strongest possible analogy exists between an application to sue *in formâ pauperis* and an ordinary plaint in a suit under Chapter V of the Code—a view fully supported by the principle upon which ss. 403 and 410 have been framed. This being so, it seems to me to follow as a corollary that rejection of an application to sue *in formâ pauperis* under s. 405 or s. 407 falls under the same general category of adjudications as the rejection of an ordinary plaint under s. 53 or s. 54. In both cases the service of notice on the opposite side, or his appearance, is not a condition precedent to the exercise of the power of rejection, and it follows that if the rejection of a plaint is a "case," the rejection of an application to sue *in formá pauperis* must also constitute a "case." Indeed, the Code in s. 2 has expressly given to "an order rejecting a plaint" the *status* of a "decree" for the purposes of appeal, and, going further in the same direction, cl. (*b*) of s. 588 gives the rights of appeal even from "orders *returning* plaints for amendment or to be presented to the proper Court," that is, from orders under s. 83 or s. 67 of the Code. Now, as I said before, it is not easy for me to conceive that an adjudication which might have constituted a "case" for appeal falls short of the meaning of that word as used in s. 622 of the Code; and I may say broadly that that which is a case for appeal must also be a case for revision, subject, of course, to the rules which govern the exercise of the appellate and revisional jurisdictions respectively. I might carry the analogical argument further by saying that the illegal rejection of a pauper's application to sue has for him the same effect as the erroneous rejection of the plaint has for an ordinary plaintiff; and though for obvious reasons the policy of the law is to differentiate between the two with reference to the right of appeal, the legal conceptions of an order rejecting

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an application to sue *in formâ pauperis* and an order rejecting the plaint, must necessarily fall under the same category so far as the interpretation of the term "case" in s. 622 is concerned. As to the policy of the law itself, I have to say, with reference to an observation made in the course of the argument, that I have long held the opinion that the only justification in the eye of legislative science for imposing taxes upon litigation in the shape of court-fees can be the check which they have upon frivolous and vexatious litigation, and that though such checks may be necessitated by the exigencies of the administration of justice, they must not be regarded as affording ground for the hypothesis that the Courts of justice in British India have been established only for the rich, and that the law is intended to give less protection to the poor than to the wealthy. It is in this light, and this light alone, that I can interpret the rules of our law as to pauper litigants, whether such rules be contained in the Court-fees Act or in the Civil Procedure Code. Something to this effect was said by me recently in disposing of an application under s. 549 of the Civil Procedure Code; and, applying the spirit of the same principle to the present case, and whilst fully aware of the policy of the law in connection with suits *in formâ pauperis* as distinguished from ordinary suits, I hold that the provisions of s. 407 must be interpreted *strictly*, because they operate in derogation of the right which every litigant has to seek the aid of the Courts of Justice. There is of course no appeal from an order rejecting a pauper's application under s. 407 of the Code; but what I have already said satisfies me that such an order would be a "case" within the meaning of s. 622. It may, indeed, as was said in the course of the argument, be a "hard case," furnishing grounds for interference in revision according to the rules provided by the law. The question must of course depend upon the circumstances of each case, and where jurisdiction has been exercised "illegally or with material irregularity," the case would of course be a proper one for the exercise of revisional powers by this Court. In *Har Prasad* v. *Jafar Ali* (1), to which I have already referred, my brother Oldfield and myself concurred in holding that an obviously wrong exercise of jurisdiction in opposition to the rules of the limitation law

(1) *Ante* p. 345.

constituted a ground for interference in revision. In the same case, in concurring with my learned brother, I illustrated my views by supposing other cases which would demand such interference, and, in the case of *Raghunath Das* v. *Raj Kumar* (1), I held, though I had the misfortune of dissenting in the result from the opinion of my brother Oldfield, that the power of amending decrees under s. 206, when exercised "illegally or with material irregularity," would furnish grounds for revision. And here I wish to point out that my learned brother differed with me, not because he did not think that an order under s. 206 would constitute a "case" within the meaning of s. 622, but because he was of opinion that the amended decree could be made the subject of appeal under s. 540, and therefore by reason of s. 622, which provides revision in appealable cases, the order could not be considered in the exercise of this Court's revisional jurisdiction. Upon the exact point which I am now considering, there was therefore no difference of opinion between my learned brother and myself.

Returning once more to orders rejecting, under s. 407, applications to sue *in formâ pauperis*, I have to cite the case of *Ammal* v. *Nayudu* (2), which supports my view of the law, and shows that an exercise of jurisdiction under that section, when such exercise of jurisdiction is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. Other rulings of the Madras High Court, which are consistent with the same view, were also cited by the learned pleader for the petitioner in this case, but I need not refer to them because they do not bear directly upon the point now under consideration. But in order to illustrate my view, I will suppose an extreme case in which the exercise of revisional jurisdiction would be necessitated in connection with orders under s. 407. Suppose a case in which the lower Court, under serious misapprehension of the law, summarily rejects an application to sue *in formâ pauperis* for reasons other than those presented in ss. 405, 406, or 409, without examining the applicant, and without making any attempt to investigate the merits of the claim or the facts as to pauperism. Would such a case not be a proper subject for revision under s. 622? The order though manifestly illegal and open to the objection of

(1) *Ante*, p. 276. (2) I. L. R., 4 Mad. 323.

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material irregularity could, of course, not be the subject of appeal, and if the argument of the learned counsel for the opposite party, in this case were to be accepted, such an order could not be made the subject of revision either. And it was said that the order was not a final adjudication, because the latter part of s. 413 leaves it open to the applicant to institute a suit in the ordinary manner —a provision similar to that of s. 56 regarding ordinary plaints. But how is such a suit to be instituted by a man who is an absolute pauper, who, whilst having a right, has suffered an injury, and when he has gone into Court to seek redress, is turned out of it by a summary order rejecting his application in the most arbitrary manner, without any adjudication as to the merits of his claim, and without any trial as to the fact of his pauperism? The law gives him no right of appeal, his indigence disables him from paying the court-fees, and if the revisional powers of this Court in such an extreme case as I have supposed could not be exercised, the necessary conclusion is that there may exist in British India cases in which there is a right which has been infringed, but for which there is virtually no remedy. But in my opinion our law contemplates no such results, and when it conferred the revisional powers upon this Court, it intended that those powers should be so exercised as to prevent such failure of justice. What I have said furnishes an answer in the affirmative to the general question which was referred to the Full Bench by my brother Oldfield and myself.

I now proceed to discuss the second aspect of the question which has been involved in the course of the argument before the Full Bench—a question which goes behind the reference, and relates to the merits of the case itself. In this aspect the present case is not an extreme case of the kind which I have supposed in illustrating the question of principle originally referred to the Full Bench. I have already said that the exercise of the Court's power to reject pauper applications under s. 407 is limited to the grounds specified in the various clauses of that section itself, and the question then which arises here is, whether the learned Subordinate Judge acted legally in rejecting the application in the present case on the ground of limitation. He could have acted only under cl. (c) of s. 407 in rejecting the application, because his judg-

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ment contains no finding as to the applicant's pauperism, and proceeds entirely upon the view "that the applicant's allegations show that he has no right to sue for the property,"—a phrase which adopts almost *verbatim* the language of the clause to which I have referred. I confess that, at the hearing before the Full Bench I entertained doubts as to whether the expression "*right to sue*," coupled with the phrase "*in such Court*," did not limit the clause to questions relating to cause of action and jurisdiction. I, however, formed no definite opinion, and by the courtesy of the learned Chief Justice I was allowed time to consider the point, and I have arrived at the same conclusion as he and my other learned colleagues have adopted with reference to this particular point. I agree with them in thinking that these phrases must be understood in their broad sense, so as to include, not only questions of jurisdiction, but also such as fall within the perview of clause (*c*), s. 54, which lays down that plaints shall be rejected "if the suit appears from the statement in the plaint to be barred by any positive rule of law." The law of limitation constitutes "a positive rule of law" barring civil actions, and s. 28 of the Limitation Act (XV of 1877) lays down that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." In the present case, which was a suit for possession of property, the learned Subordinate Judge has found that the suit was barred by limitation, and bearing in mind the rule of the limitation law to which I have just referred, I am of opinion that he acted rightly in holding that the applicant's allegations did not show "*a right to sue*" in his Court within the meaning of cl. (*c*.), s. 407 of the Civil Procedure Code. Whether his conclusions upon the merits of the case were correct or erroneous is another matter, but he had jurisdiction to adjudicate upon the case, and in the exercise of his jurisdiction he did not act "illegally or with material irregularity" with in the meaning of s. 622 of the Code. If he had acted with such illegality or material irregularity, the case would, in my opinion, for the reasons already stated, have been a fit one for interference in revision. But here the learned Subordinate Judge appears to have observed all the rules of law provided for such matters, and his judgment shows that he considered the merits of the claim, and

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disposed of the application after having heard the defendant or the opposite party.

For these reasons I formulate my answer to this reference in the following terms :—

The Court has powers under s. 622, Civil Procedure Code, to revise an order passed under s. 407, Civil Procedure Code, rejecting an application for permission to sue *in formâ pauperis*, in cases where such rejection has been made by exercising jurisdiction "illegally or with material irregularity" within the meaning of s. 622, but in the present case the jurisdiction vested in the lower Court, having been exercised without being open to either of such objections, the present is not a fit case for revision under s. 622, Civil Procedure Code.

CRIMINAL REVISIONAL.

1885 *April* 23.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

QUEEN EMPRESS *v.* DURGA CHARAN.

Review of judgment—Criminal case—Criminal Procedure Code, s. 369.

The High Court has no power under s. 369 of the Criminal Procedure Code, to review an order dismissing an application for revision made by an accused person, and the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government.

Per BRODHURST J.—The Legislature has not conferred in express words upon a High Court the power of reviewing its judgments in all criminal cases as it has done under the Civil Procedure Code in civil cases ; and the provisions of s. 369 of the Criminal Procedure Code, so far as they affect the High Court, apply merely to questions of law arising in its original criminal jurisdiction, and which are reserved and are subsequently disposed of under the provisions of s. 434 of the Criminal Procedure Code and ss. 18 and 19 of the Letters Patent for the High Court of the North-Western Provinces. *Queen* v. *Godai Raout* (1) referred to.

ON the 18th March, 1884, a pleader was convicted by a Magistrate of cheating, and was fined Rs. 200. This conviction and sentence were affirmed by the Court of Session, on appeal, on the 7th May, 1884. The pleader then applied to the High Court for revision. This application was rejected on the 12th August, 1884, by Duthoit, J. Subsequently, with reference to this conviction, the District Judge, under Act XVIII of 1879 (Legal Practitioners Act), reported the case to the High Court for orders, expressing

(1) 5 W. R., Cr. 61.

his opinion that the pleader was unfit to be allowed to practice. The case came for disposal before the Full Bench. With the permission of the Bench, the pleader's counsel was allowed to argue that his client had committed no offence at law. After hearing argument on this point, the Full Bench was of opinion that the pleader should not be either suspended or dismissed under s. 12 of Act XVIII of 1879 (1).

The pleader then applied to the High Court for a review of its former judgment of the 12th August, 1884.

Mr. *T. Conlan*, for the appellant.

PETHERAM, C. J.—In my opinion this Court has no power to review the order of Mr. Justice Duthoit, by which he dismissed the application for revision made by the accused, and therefore the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government.

BRODHURST, J.—This is an application that this Court will, under the provisions of s. 369 of the Criminal Procedure Code, review an order passed, on revision, on the 12th August, 1884, by Duthoit, J., who is no longer a Judge of this Court.

The question now arises whether a High Court in India can in any criminal case—*i.e.*, as a Court of original jurisdiction, or as a Court of appeal, or as a Court of revision—review its judgment or order.

A Full Bench of the High Court of Calcutta, in the case of *Queen* v. *Godai Raout* (2), held that a review of judgment will not lie from a sentence or judgment pronounced by the High Court in a criminal case upon appeal, and the learned Judges were of opinion that "it was the intention of the Legislature that the Court should not exercise the power of reviewing its own judgment in criminal cases."

That Full Bench judgment was delivered on the 15th February, 1866, when Act XXV of 1861 was the Code of Criminal Procedure in force; but the following extract from the judgment is still in point, even though the Code of Criminal Procedure has since then been more than once amended.

(1) *Ante*, p. 290. (2) 51 W. R., Cr. 61.

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QUEEN-EMPRESS v. DURGA CHARAN.

"The Code of Criminal Procedure does not contain any section expressly authorizing a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorizing a review of judgment, but the former contains no corresponding section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases."

The Legislature has not, even under the Criminal Procedure Code now in force, conferred, in express words, upon a High Court, the power of reviewing its judgments in all criminal cases as it has done under the Civil Procedure Code in civil cases; and, in my opinion, the provisions of s. 369 of the Criminal Procedure Code, so far as they affect a High Court, apply merely to questions of law arising in its original criminal jurisdiction, and which are reserved and are subsequently disposed of under the provisions of s. 434 of the Criminal Procedure Code and the corresponding sections of Letters Patent, which, for the North-Western Provinces, are ss. 18 and 19.

Under these circumstances, I concur with the learned Chief Justice in rejecting the application.

Application refused.

APPELLATE CIVIL.

1885
April 23.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

AJUDHIA (DEFENDANT) *v.* BALDEO SINGH (PLAINTIFF).*

Pre-emption—Profits of property accruing between purchase and transfer to pre-emptor.

B purchased a share in a mahal on the 3rd January 1880 (Pus, 1287 fasli). *A* sued *B* and the vendor to enforce his right of pre-emption, and, on the 24th March 1882 (Chait, 1289 fasli), obtained a final decree enforcing the right. Subsequently *B*, as a co-sharer in the mahal, during 1288 fasli, claimed from *A*, as lambardar of the mahal, the profits of the share for 1288 fasli.

Held that the pre-emptive right which was declared in the suit instituted by *A*, when it was once established, existed, and must be presumed to have taken

* Second appeal No. 935 of 1884, from a decree of W. Barry, Esq, District Judge of Bánda, dated the 29th April, 1884, affirming a decree of Muhammad Fazal Azim, Assistant Collector, 1st class, of Hamírpur, dated the 21st February, 1884.

effect on the date when the subsequently awarded sale to *B* took place, and therefore there was no period of time during which *B* was properly in possession of the share and entitled to profits from *A* in his character of lambardar, but *A* must be presumed to have been in possession and entitled to the profits from the date of the sale to *B*.

THE plaintiff in this suit purchased a share in a mahál on the 3rd January, 1880, (Pús, 1287 fasli). The defendant sued him and the vendor to enforce the right of pre-emption, and, on the 24th March, 1882, (Chait, 1289 fasli), obtained a final decree enforcing the right. In this suit the plaintiff, as a co-sharer in the mahál, during 1288 fasli, claimed from the defendant, as lambardár of the mahál, the profits of the share for 1288 fasli. The Court of first instance dismissed the suit, holding that, as the defendant had obtained a decree enforcing his right of pre-emption in respect of the sale of the share to the plaintiff, he must be considered to have been in proprietary possession from the date of such sale, and not merely from the date of the final decree or the date he obtained possession thereunder, and therefore the plaintiff had no right to sue. The lower appellate Court, referring to *Baldeo Pershad* v. *Mohan* (1), reversed this decision, and remanded the case for trial on the merits. The Court of first instance accordingly tried the case on the merits, and gave the plaintiff a decree, which the lower appellate Court affirmed.

In second appeal, the defendant contended that the plaintiff was not entitled to the profits for 1288 fasli, and his suit was therefore not maintainable.

Babu *Baroda Prasad Ghose*, for the appellant.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukerji*, for the respondent.

STRAIGHT, J.—I am of opinion that the appeal must prevail, and that the decision of the lower Courts must be reversed. It does not appear to me that the argument put forward in support of the plaintiff's claim will bear examination. The pre-emptive right which was declared in the suit instituted by the defendant against the plaintiff, when it was once established, existed, and must be presumed to have taken effect on the date when the subsequently awarded sale to the plaintiff took place, and therefore

(1) N.-W. P. H. C. Rep., 1866, R. C. A., p. 30.

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there was no period of time during which the plaintiff was properly in possession of the share, and entitled to profits from the defendant in his character of lambardár. It seems to me that the defendant must be presumed to have been in possession and entitled to the profits from the date of the sale to the plaintiff. The appeal is therefore decreed, and the suit dismissed with costs.

TYRRELL, J., concurred.

Appeal allowed.

1885 *April* 28

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Brodhurst.

CHEDAMI LAL (JUDGMENT-DEBTOR) *v.* AMIR BEG (PURCHASER.)*

Execution of decree—Sale—Property sold before advertized time—Sale invalid.

A sale by public auction in execution of a decree, which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the Civil Procedure Code.

The time to be notified for a sale by public auction in execution of a decree must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, and that all who are interested in the property sold may see that there is a fair competition and a good sale.

Where property which was advertized for sale by public auction in execution of a decree at 11 A. M. was sold at 7 A. M.,—*held* that the mistake was more than a mere irregularity in conducting the sale, and that the whole of the proceedings were invalid.

THIS was an appeal from an order refusing to set aside a sale of a house in execution of a decree. The judgment-debtor applied to have the sale set aside on the ground that the property had been advertized to be sold at 11 A. M., whereas it had been sold at 7 A. M., whereby the property was sold for much below its proper value. The Court executing the decree refused the application. The judgment-debtor appealed to the High Court.

Babu *Ratan Chand*, for the appellant.

Shah *Asad Ali*, for the respondent.

PETHERAM, C. J.—I think that this appeal must be allowed, and the sale set aside. It may be—I am not in a position to say whether it is so or not—that in this particular case no harm has been done. Whether that is so or not, this way of dealing with

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* First Appeal No. 1 of 1885, from an order of Babu Baij Nath, Munsif of Agra, dated the 27th November, 1884.

property is, in my opinion, a dangerous one, and such as should not be allowed by the Court. The statute says that when the immoveable property of a judgment-debtor is to be sold in execution of a decree, the time and place of the sale are to be notified, in order that the whole of the neighbourhood may be made aware of it, so that the debtor's property may be sold to the best advantage. Further, the time to be notified must be the time of the *commencement* of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, to see how the biddings go, and that all who are interested in the property sold may see that there is a fair competition and a good sale. This being so, I consider that a sale which was advertized to begin at 11 A. M., but in fact began at 7 A. M, was vitiated by more than a mere irregularity in conducting the sale, for the mistake went to the very root of the whole proceeding. The statute authorizes a sale which is to conducted at a time and place properly notified, and a sale otherwise conducted is not a sale at all within the meaning of the statute. I am therefore of opinion, not merely that there was an irregularity in the sale, but that there was, practically speaking, no sale at all. The whole proceeding must therefore be set aside, and the parties will revert to the rights which they had before. The appeal is allowed, but without costs, as the purchser was wholly innocent.

BRODHURST, J., concurred.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Straight.

1885.
May 6.

RADHA PRASAD SINGH (PLAINTIFF) *v.* BHAJAN RAI AND OTHERS (DEFENDANTS).*

Limitation—Burden of proof—Instalment bond—Indorsement of payment of instalments.

Where a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred. If, when the plaintiff has proved his case, the facts show that the cause of action accrued at a date earlier than the period of limitation, and the plea of limitation has been set up by the defendant, the will be entitled to take advantage of the plaintiff's evidence that the claim is barred, and to have judgment given in his favour.

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* First Appeal No 13 of 1884, from a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Gházipur, dated the 27th September, 1883.

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RADHA PRASAD SINGH v. BHAJAN RAI.

The obligee of a bond, by which the obligor covenanted to pay the sum of Rs. 3,800 by annual instalments of Rs. 200, and in which it was also agreed that payments of the instalments should be indorsed on the bond, brought a suit against the obligor alleging default in payment, and claiming to recover the amount of the bond. He gave credit for payment of the instalments for seven years, and alleged that his cause of action arose upon default in payment of the eighth instalment. The bond showed on its face indorsements of the payments for which credit was given. The obligor alleged that no instalments were paid after the third year, that therefore the debt became due at an earlier date than that stated by the plaintiff, and that the claim was barred by limitation.

Held that inasmuch as the defendant adduced no evidence to show that the later instalments were not paid, and inasmuch as the evidence produced by the plaintiff did not show that the debt accrued at a date earlier than the limitation period, the plea of limitation failed.

THE suit in which this appeal arose was based on a bond for Rs. 3,800, payable by instalments of Rs. 200, dated the 19th September, 1864. This bond had been given in adjustment of the balance due on a decree. It provided that the first instalment should be paid on the 15th Bhadon Sudi 1272 fasli (5th September, 1865), and the remaining instalments on the 15th Bhadon Sudi of every succeeding fasli year up to 1290 fasli, and that in the event of default in payment of any instalment on the due date, the whole amount of the bond should be payable. It further provided that the obligors would have payments of instalments indorsed on the bond. The plaintiff, alleging that the first default had occurred on the 15th Bhadon Sudi 1279 fasli (17th September, 1872), when only one-half of the eighth instalment due on that date had been paid, claimed to recover the balance of that instalment and the amount of the remaining eleven instalments. His cause of action was stated to have arisen on the 15th Bhadon Sudi 1279 fasli (17th September, 1872), when the eighth instalment fell due and was not paid. He sought to recover the amount claimed by the sale of property alleged to be mortgaged by the bond. The bond contained the following indorsements :—

"Paid on	15th	Bhadon	Sudi	1272	...	Rs.	200
"	"	"	"	1273	...	"	200
"	"	"	"	1274	...	"	200
"	"	"	"	1275	...	"	200
"	"	"	"	1276	...	"	200
"	"	"	"	1277	...	"	200
"	"	"	"	1278	...	"	200
"	"	"	"	1279	...	"	100 "

The suit was instituted on the 9th July, 1883. The defendants alleged in defence of the suit, *inter alia*, that no instalments had been paid after the third instalment, that of the 15th Bhadon Sudi 1274 fasli (13th September, 1867), and the suit was barred by limitation. With reference to indorsements on the bond, which showed that the instalments had been duly paid up to the 15th Bhadon Sudi 1279 fasli (17th September, 1872), when only one-half of the instalment due on that date had been paid, the defendants alleged as follows:—"All payments indorsed by the plaintiff on the bond were indorsed of his own authority: such indorsements cannot save time, unless they are acknowledged by the defendants or are in their handwriting and bear their signatures."

The plaintiff called witnesses who deposed to the payment of the instalments for 1275, 1276, 1277; he produced no evidence to show by whom and under what circumstances the indorsements on the bond were made. The defendants produced evidence showing that the first instalment had been paid by them to the plaintiff's agent, and the second and third into the Court executing the decree in adjustment of which the bond had been given. They did not call witnesses to prove that no instalments had been paid after the third instalment.

The Court of first instance held that the plaintiff had failed to prove that any instalment had been paid after the third instalment, and, applying art. 132, sch. ii of the Limitation Act, 1877, held that the suit was barred by limitation.

The plaintiff appealed to the High Court.

Mr. *T. Conlan* and Lala *Lalta Prasad*, for the appellant.

Mr. *G. T. Spankie*, for the respondent.

It was contended for the appellant that the bond was a mortgaged-bond, and the suit one by a mortgagee for sale of the mortgaged property, and the limitation applicable to the suit was therefore that provided by art. 147 of the Limitation Act, 1877, and not art. 132. It was further contended that the plaintiff had proved that the instalments had been duly paid up to 15th Bhadon Sudi 1279 fasli (15th September, 1872), and therefore, assuming art. 132 was applicable, the suit was within time.

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For the respondent it was contended that the bond created a charge and not a mortgage, and art 132 of the Limitation Act, 1877, and not art. 147, was applicable to the suit; that assuming that the bond created a mortgage and not a charge, yet the suit could not be governed by art. 147 of the Limitation Act, 1877, as the suit was barred by art 132 of the Limitation Act, 1871, when the latter Act was repealed and the former Act came into force, and, therefore, under s. 2 of the former Act, the right to sue could not be revived by anything contained in the former Act. Further, it was contended that the lower Court had rightly held that the plaintiff's witnesses had not proved that any instalments had been paid after the third instalment, and the plaintiff having undertaken the burden of proving that his suit was within time, and having failed to prove that fact, his suit had been properly dismissed. With reference to the indorsements on the bond, it was contended that they were not admissible against the defendants as evidence that the instalments had been paid.

PETHERAM, C. J.—I think that this appeal must be allowed, and my conclusion is based upon the simple ground that the defendant has not proved the plea of limitation which he set up. It is a well known rule that if a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred. No doubt, if when the plaintiff proves his case, it appears from the facts that the debt accrued at a date earlier than the period of limitation, and the defendant has set up the plea of limitation, in that case the defendant will be entitled to judgment; that is to say, he will be entitled to take advantage of the plaintiff's evidence that the claim is barred, when he has given notice that such a defence will be made. That, however, is not the state of things existing in this case. The facts are, that in 1864 the defendant entered into a bond with the plaintiff, and covenanted to pay a large sum of money by yearly instalments, and one term of the agreement was that receipts or memoranda of payments should be indorsed upon the bond, which, of course, remained in the possession of the creditor. The plaintiff now sues for the money which he says is due to him. He puts in the bond, and says that he does not claim for the whole amount but gives credit for certain payments. The bond shows what would be due if these instalments

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had been paid, and shows upon its face the indorsements of these payments. The defendant met this case with no evidence whatever. His case now is, that the later instalments were never paid, and that therefore the debt became due at an earlier date than that alleged by the plaintiff. But in support of this he adduces no evidence. The only question therefore is, whether the plaintiff's evidence shows that the debt accrued at a date earlier than the limitation period. I am of opinion that it does not show this, and therefore, the defendant not having proved it, and it not having been proved for him by the plaintiff's evidence, and the plaintiff's claim having been admitted on every other point except that of limitation, the appeal must be allowed with costs.

STRAIGHT, J.—I concur in the order passed by the learned Chief Justice and upon the same grounds.

Appeal allowed.

CIVIL REVISIONAL.

1885
May 9.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAYNOR (PLAINTIFF) *v.* THE MUSSOORIE BANK, LIMITED (DEFENDANT). *

Transfer of interest pending suit—Lis pendens—Application to bring transferee upon the record—Civil Procedure Code, ss 244, 372—*High Court's powers of revision —Civil Procedure Code, s.* 622.

A decree of the High Court, giving possession of certain shares in a bank to the plaintiff *R*, was reversed on appeal by the Privy Council. The defendant then applied to the Court of first instance to order restitution of the shares, which had been realized by the plaintiff. Upon being ordered to produce the shares, *R* made an application to the Court, professedly under s. 244 of the Civil Procedure Code, in which he alleged that, pending the appeal to the Privy Council, he had transferred the shares to *G*, his counsel in the case, who had failed to restore them, and he prayed "that the said person might be brought upon the record, and that execution for recovery of the said shares might be given against him". The Court passed an order upon this application, calling on *G* to show cause why he should not be called upon to restore the shares made over to him by *R*, and he thereupon filed an answer denying that he was the custodian of the shares, and alleging that he was their purchaser for value. The Court passed an order directing that *G's* name should be placed on the record, so that the decree might be executed against him.

* Application No 33 of 1885 for revision of an order, under s. 622 of the Civil Procedure Code, of G J. Laidman, Esq., Judge of the Court of Small Causes of Dehra Dún, dated the 25th November, 1884.

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Held that the question being one between two judgment-debtors *inter se*, and not between the parties arrayed against each other as decree-holders of the one part, and judgment-debtors or their representatives of the other, the provisions of s. 244 of the Civil Procedure Code were not applicable to the case; that *G* could not be regarded as a "representative" of *R* within the meaning of that section; that the application by *R* was meant to be and actually was one praying that, in respect of the scrip, restitution of which was being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such interest had passed from him, be brought under the operation of the execution proceedings; that this was an application under s. 372 of the Civil Procedure Code; and the order passed on it, being appeallable under s. 588 (21), was not open to revision by the High Court under s. 622.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of the Civil Procedure Code. It appeared that by virtue of an appellate decree of the High Court, dated the 22nd August, 1878, A. C. Raynor, the plaintiff in a suit against the Mussoorie Bank, Limited, instituted in the Court of the Subordinate Judge of Dehra Dùn, and numbered 24 of 1877, recovered twenty-four shares in the Delhi and London Bank, Limited. On the 21st March, 1882, the appellate decree of the High Court was reversed by Her Majesty in Council. In July, 1882, the Mussoorie Bank made an application to the Subordinate Judge, "under s. 244, Act XIV of 1882," in which it prayed that the Court would cause the shares unduly realized in execution of the decree of the High Court to be restored. The Subordinate Judge eventually made an order directing the plaintiff, A. C. Raynor, to produce the shares, and, on his failing to do so, issued a warrant for his arrest. In March, 1884, the plaintiff made an application to the Subordinate Judge in which he stated as follows:—

"That a warrant was issued by this Court against the plaintiff to compel him to restore twenty-four Delhi and London Bank, Limited, shares numbered 7371 to 7394 that he had forced defendant to deliver to him, in execution of decree No. 89 of 1878 of the High Court of Judicature, North-Western Provinces, which decree had been reversed by Her Majesty in Council.

"2. That this Court's proceedings proved ineffectual for the reason that, while the litigation was going on, plaintiff had transferred the shares to one of his counsel in the case, Mr. H. B.

Goodall, Barrister, who has failed to restore them and is now in England.

"3. In respect of these shares the said H. B. Goodall is plaintiff's representative, and applicant desires that he should be brought upon the record, and that execution for recovery of the said shares may be given against him.

"4. The plaintiff has made over the documents specified in the annexed list in support of his statement that Mr. Goodall holds the shares in suit, and professes himself willing to submit to re-examination by the Court on the subject."

On this application the Subordinate Judge directed notice to issue to H. B. Goodall to show cause why he should not be called on to restore the shares. Goodall filed an answer in which he stated, among other things, as follows:—

"My reply is that I am not, and never was, the custodian of those shares, but their purchaser for value. I bought them out and out, more than five years ago. This was fully recognized at the time, and there never was any suggestion of transferring them temporarily."

The Subordinate Judge made an order directing that Goodall's name should be placed on the record, so that the decree might be executed against him. He observed as follows:—

"The facts of this case are as follows:—Some years ago the Mussoorie Bank, in executing a decree against Mr. M. A. Raynor, attached twenty-four shares in the Delhi and London Bank. An objection was made to the attachment, but the objection was disallowed by this Court on 5th December, 1876. On 16th March, 1877, Mr. A. C. Raynor, son of Mr. M. A. Raynor, brought a regular suit to set aside the order disallowing the objection. He lost the suit, but appealed to the High Court, which reversed the decision of this Court, and decreed him possession of the twenty-four shares, Nos. 7371-7394. In execution he got possession of the shares. The bank then preferred an appeal to the Privy Council, and eventually the decision of the High Court was reversed, and that of this Court maintained.. But this was not till 1882, and meantime Mr. Raynor had disposed of the shares to Mr. H. B.

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Goodall, from whom the Bank now seeks to get them. The question that arises is: "Can Mr. Goodall's name be brought into the suit in execution of the decree, or will the Bank have to proceed against him by a regular suit?" The case has been argued by Mr. Quarry for the Bank, and Mr. H. Vansittart for Mr. Goodall. The former urges the doctrine of *lis pendens*. The latter in his arguments lays great stress on the fact that the decree of the Privy Council merely ordered that Mr. Raynor's suit should be dismissed, not that the shares should be restored by him to the bank: this, however, in the opinion of the Court, is a quibble hardly worth notice; the decree certainly implied restitution of the shares. In the Court's opinion, a stronger argument in Mr. Goodall's favour is the fact that in March last year, Mr. Justice Oldfield, in *Jagat Narain* v. *Jagrup* (1), held that the word "representative" in s. 244, Civil Procedure Code, has no more extended meaning than heir, devisee and executor, and does not include purchasers of a judgment-debtor's property. But there is a difference of opinion on the point, and the Court does not see how a separate suit can be required against Mr. Goodall. Otherwise suits would be interminable, if one party pending the suit could by conveying to others create a necessity for introducing new parties. The doctrine of *lis pendens* is held to apply to India, and the law is that he who accepts a purchase from a defendant *pendente lite* does so subject to the decree which may be made in the suit. And a recent decision of the High Court of these Provinces—"*Hukm Singh* v. *Zunki Lal*," (2) decided 30th June last,—confirms the Court in its opinion that Mr. Goodall can be proceeded against in execution of the decree."

Goodall applied to the High Court for revision of the Subordinate Judge's order on the following grounds:—

1. That the said order was made without jurisdiction.

2. That it was not competent to the Court to place the name of the applicant upon the record for the purposes of execution of the said decree.

3. That the Court has misapplied the law relative to *lis pendens*.

(1) I. L. R., 5 All. 452. (2) I. L. R., 6 All. 506.

4. That the Court has misunderstood the effect of the decree of Her Majesty in Council.

Mr. *C. H. Hill*, for the applicant.

Mr. *G. E. A. Ross*, for the Bank.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment:—

TYRRELL, J.—A preliminary objection has been taken to this application by the learned counsel for the respondent, on the ground that it is not cognizable by us in the exercise of the revisional jurisdiction of this Court. It appears that an application had been made to the Civil Court at Mussoorie, by a party entitled under a Privy Council decree to the benefit of some scrip, by way of restitution to be made to such party by one Raynor, who had been plaintiff in the suit, but was respondent and judgment-debtor under the Privy Council decree (s. 583 of the Civil Procedure Code). The Court at Mussoorie has unquestioned jurisdiction to execute this decree, and is competent to enforce or execute it in the manner and according to the rules applicable to the execution of its original decrees (s. 610). In the exercise of this jurisdiction the Mussoorie Court, by virtue of the rule of s. 647 of the Code, is authorized to follow in these proceedings the procedure provided by Chapter XXI (Of Incidental Proceedings) for suits. By the last section (372) of that chapter, it is provided that in cases of assignment, creation, or devolution of any interet, pending a suit, *other than* devolution to a "legal representatives", that is to say, an heir, devisee, or executor, the proceedings may, with the leave of the Court, given after the service of notice in writing on all parties and hearing their objections, if any, be continued against the person to whom such interest has come, either in addition to, or in substitution for, the person from whom it has passed. Let us see now what the application made by Raynor really was, and what part of the Court's legal machinery he proposed thereby to put in motion. He applied, stating that a warrant of the Court executing the Privy Council decree had been issued against him, presumably under s. 259 or 261 of the Civil Procedure Code, for the surrender by him of twenty-four Delhi and London Bank shares (paragraph 1 of the petition),

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that obedience on his part had been obstructed by the circumstance that "while the litigation was going on" he had "transferred the shares to one of his counsel in this case, who has failed to restore them" (paragraph 2), and he therefore prayed that the said person "might be brought upon the record, and that execution for the recovery of the said shares may be given against him" (paragraph 3). And in the last paragraph (4) of his petition, Raynor tendered and filed in the Court documentary proof that "Goodall *holds* now the shares in suit." This application purported to be made under s 244 of the Civil Proeedure Code. But apart from other considerations showing that s. 244 is not applicable to a proceeding of this character, it is sufficient here to observe that an application cognizable under that section must be an application *between* the parties, that is to say, between the parties arrayed against each other as decree-holder of the one part, and judgment-debtors or their representatives of the other. But this is not such a question. It is a controversy of two judgment-debtors *inter se*, and the provisions of s. 244 do not apply to the determination of such questions.

Moreover, the allegations of Raynor were sufficient of themselves to show that no real or *bonâ fide* plea of "representation" of him (Raynor) by Goodall in the sense of s. 244 (*c*) was raised, or meant to be made in the application; for Goodall is therein described as a limited, temporary transferee or depositary only—a "holder"—who "has failed to restore," and the documents produced in proof are intended to show that the proprietary interest in the scrip never passed from Raynor to Goodall, who is a wrong-doer in continuing to hold it.

This view is further fortified by a consideration of the order issued by the Court on this application, and of Goodall's answer thereto. The Court did not call on Goodall to show cause why he should not be made liable under the decree as a representative of Raynor; but to show cause why he "should not be called upon to *restore* the twenty-four Delhi and London Bank shares *made over to him* by Raynor." To which Goodall replied:—"My reply is, that I am not, and never was, the custodian of these shares, but their purchaser for value." The question thus raised is not

a question between the decree-holder and a "representative" of his judgment debtor.

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It appears to us that the application was meant to be, and actually was, an application on the part of Raynor, praying that, in respect of the scrip, restitution of which was being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such interest had passed from him, be brought under the operations of the execution proceedings. With the merits of this application and the propriety of the order passed on it, we have nothing to do. For it is an application under s. 372 of the Civil Procedure Code, and an appeal is allowed [s. 588, (21)] to a person whose objection under it has been disallowed. We therefore allow the preliminary objection, and reject the application with costs.

Application refused.

APPELLATE CIVIL.

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June 10.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

MASUMA BIBI AND ANOTHER (PLAINTIFFS) *v.* THE COLLECTOR OF BALLIA ON BEHALF OF THE COURT OF WARDS (DEFENDANT).*

Court of Wards—Disqualified proprietor—Release of property from superintendence of Court—Act XIX of 1873 (*N.-W. P. Land-Revenue Act*), *ss.* 194, 195.—*Act VIII of* 1879 (*N.-W. Land Revenue Act*) *s.* 20.

M, a female proprietor, brought a suit to recover possession of certain lands which were in the hands of the Collector, as manager of the Court of Wards, on the allegations that she had placed the property in the hands of the Court some years previously because she was not at that time in a position to manage it herself, but that she was now capable of managing it, and desired to get it back. The suit was dismissed, and the plaintiff appealed on the ground, *inter alia*, that inasmuch as she was not a "disqualified proprietor" within the meaning of Act XIX of 1873, (N.-W. P. Land Revenue Act), the Court of Wards had no jurisdiction to take the property, and that its possession was merely the result of an arrangement to which she was a consenting party, and which she now desired to terminate.

Held that, with reference to the provisions of Act XIX of 1873, and Act VIII of 1879 (N.-W. P. Land Revenue Acts), the suit as brought was not maintainable, inasmuch as there was no evidence that the plaintiff had obtained the

* First Appeal No. 90 of 1884, from a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Ghâzipur, dated the 5th February, 1884.

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previous sanction of the Local Government to the release of the property from the superintendence of the Court of Wards, as required by s. 20 of the latter Act.

Held also that the plaintiff could not be allowed in appeal entirely to change the nature of the grounds upon which she alleged herself to be entitled to claim relief, and that hence she could not now raise the plea that the Court of Wards, in taking the property under its management, had acted without jurisdiction.

The expression "Local Government" in ss. 194 and 195 of Act XIX of 1873, and s. 20 of Act VIII of 1879, means the Lieutenant-Governor of the North-Western Provinces.

THE plaintiffs in this case, Masuma Bibi and Nawab Ahmad Hasan Khan, sued the Collector of the Ballia district, as Manager on behalf of the Court of Wards, for possession of an estate called taluqua Sunwani and of certain houses. It was alleged in the plaint that the property in suit belonged to the plaintiff, Masuma Bibi; that, not being competent to manage her property, she had, in 1869, made the whole of it over to the Court of Wards; that the management of the property by the Court of Wards had not proved beneficial to it; that Masuma Bibi had therefore transferred the taluqua and the houses to Nawab Ahmad Hasan Khan, by an oral gift, made in October, 1882; that Masuma Bibi had applied to the Board of Revenue to confirm the gift, but that authority had declined to do so; that Nawab Ahmad Hasan Khan was qualified to manage the property; and that therefore there was no longer any necessity for the property to remain under the management of the Court of Wards. The Collector set up as a defence to the suit, *inter alia*, that under s. 205, Act IX of 1873, as amended by Act XII of 1879, the plaintiff, Masuma Bibi, was not competent to bring any suit, except on behalf of and in the name of the Collector of the district; that Ahmad Hasan Khan had no right to the property, the gift to him being void, Masuma Bibi being, under s. 205 of Act XIX of 1873, as amended by Act XII of 1877, incompetent to make a gift, and the gift being further void under the Muhammadan Law and s. 123 of the Transfer of Property Act; and that "the property, which has been taken under the management of the Court of Wards, under s. 194, clauses (*a*) and (*g*), Act XIX of 1873, cannot be released from its superintendence without the sanction of the Local Government,—*vide* s. 195, Act XIX of 1873, as amended by s. 20,

Act XII of 1879." At the hearing of the case it was contended for the defendant that under s. 241 (*k*) of Act XIX of 1873, the Civil Courts had no jurisdiction to entertain the suit. The lower Court held that the suit was cognizable in the Civil Courts; that the plaintiff, Ahmad Hasan Khan, had no title to the property; and therefore could not maintain the suit; and that the plaintiff, Masuma Bibi, would be entitled to recover possession of the property, if she could show the Court of Wards had committed waste. On this last point, it held that there was no proof that the Court of Wards had committed waste, and it therefore dismissed the suit.

The plaintiffs appealed to the High Court. The second ground of appeal was as follows :—" Because, appellant, Masuma Bibi not being a 'disqualified proprietor,' the assumption of management by the Court of Wards did not disable her from dealing with her property in the manner adopted by her."

Mr. T. *Conlan*, and Mr. C. H. *Hill*, for the appellant.

Mr. *G. E. A. Ross* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

PETHERAM, C.J.—I am of opinion that this appeal should be dismissed as it stands. This was a suit brought by Masuma Bibi and Nawab Ahmad Husain Khan to recover possession of the property which, at the time when the suit was instituted, was in the hands of the Collector as Manager of the Court of Wards. The suit was brought on a statement that the plaintiff, Masuma Bibi, had placed the property in the hands of the Court of Wards some years ago, and had done so because she was not in a position to manage the property herself. She alleged that the Court had managed the property badly, and that its condition had become worse, and that she, having given it to her grandson, was now capable of managing it, and desired to get it back. Upon this state of things the case went to trial, and the plaintiff gave no evidence. The defendant did give some evidence, of which it is not necessary to say more than that its effect was to show that the estate had been managed properly. If this is the true state of things, and the plaintiff did hand over the property to the Court of Wards, and the property could be so handed over, I am

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of opinion that the action could not be maintained with reference to the provisions of Act XIX of 1873 and Act VIII of 1879. If she could hand over the property, it could only be on the ground that she, as a female, was incapable of managing it properly herself, and it would be necessary that she should be deemed incapable of the management by the Local Government, which, in my opinion, means the Lieutenant-Governor. The statement of claim was all that she put before the Court, and that says that she herself made over the property to the Court of Wards, and therefore she must have satisfied the Lieutenant-Governor that she was incapable of managing it. Then we come to s. 20 of Act VIII of 1879. The suit was in the form of an action for ejectment, and it is said that the Court of Wards properly had charge of the property, but was now desirous to release it to the persons entitled to it. S. 20 of Act VIII of 1879 enacts, by way of proviso to s. 195 of Act XIX of 1873, giving the Court power to release property under its management, that "the property of a proprietor who has been held disqualified under the same section [(s. 194), cl. (*a*), cl. (*e*), cl. (*f*), or cl. (*g*)] shall not be released from the superintendence of the Court of Wards without the previous sanction of the Local Government." Now there is no evidence of this sanction having been obtained, and I am therefore of opinion that the suit as brought and the appeal must both be dismissed.

It has been suggested during the argument before us that Masuma Bibi may be entitled to bring the action upon a different ground altogether, which is that this is property which the Court of Wards had no jurisdiction to take, that the Court's possession was merely the result of an arrangement to which the plaintiffs were consenting parties, and which they now desire to terminate. If this view is correct, and it is not necessary for me to express any opinion upon that point, they would be entitled to get back the property. But they cannot do so in the present suit. They cannot, now at least, contend that the Court of Wards should be compelled to release the property. Whether it was legally under the Court's management or whether the defendant-vendee is legally in possession, we need not now decide. The appeal is dismissed with costs.

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STRAIGHT, J.—I concur in what has fallen from the learned Chief Justice, but I wish to add that the main ground upon which I hold that this appeal should be dismissed is, that the case which is now put forward by Mr. Hill, the nature of which was shadowed forth by the second plea in the memorandum of appeal, is not the case upon which his client came into Court, or that which is presented on the face of the plaint. It is an entirely new case which has been stated in this Court for the first time in appeal, and raises an issue, which necessarily was not considered by the Court below, nor did the plaintiff give any evidence in support of it.

Under such circumstances, I do not consider that we should allow the plaintiff in appeal entirely to change the nature of the grounds upon which she alleges herself to be entitled to relief, and for this reason I concur in dismissing this appeal with costs.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885 *February* 2.

DEBI PRASAD (PLAINTIFF) v. HAR DAYAL (DEFENDANT).*

Occupancy tenant—Suit for ejectment—Act by tenant inconsistent with purpose for which land was let—Mortgage of occupancy-holding—Cancelment of mortgage before institution of suit for ejectment—Act XII of 1881 (*North-Western Provinces Rent Act*), *ss.* 9, 93 (*b*), 149.

An occupancy tenant made a usufructuary mortgage of his holding, and afterwards had the land and the mortgage deed returned to him, and the mortgage was cancelled. Subsequently, the landlord instituted a suit for ejectment, on the ground that by the mortgage the tenant had committed an act inconsistent with the purpose for which the land was let, within the meaning of Act XII of 1881 (N.-W P. Rent Act), s 93 (*b*).

Held by OLDFIELD, J., that, apart from the question whether executing a mortgage of his holding was an act within the meaning of s 93 (*b*) of the Rent Act, the mortgage having been cancelled, there was no cause of action left, and the penalty should not be enforced, with reference to s. 149.

Held by MAHMOOD, J., that the occupancy tenure could not be brought to an end except on grounds clearly provided by the law, and the execution of the mortgage, though illegal and void, was not "any act or omission detrimental to the land" or "inconsistent with the purpose for which the land was let" within the meaning of s. 93 (*b*) of the Rent Act, and furnished no ground for ejectment *Gopal Pandey* v. *Parsotam Das* (1), and *Naik Ram Singh* v. *Murli Dhar* (2) referred to.

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* Second Appeal No 88 of 1885, from a decree of G J. Nicholls, Esq, District Judge of Azamgarh, dated the 10th September, 1884, affirming a decree of Babu Jagmohan Singh, Deputy Collector of Azamgarh, dated the 21st July, 1884.

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Also *per* MAHMOOD, J.—The terms of s 93 (*b*) of the N.-W. P. Rent Act apply, *exempli gratia*, to cases in which land is given to a tenant for purposes of cultivation, and is used by him for building or other purposes.

THIS appeal was heard under s. 551 of the Civil Procedure Code. It appeared that an occupancy-tenant made a usufructuary mortgage of his holding, and the zamindar instituted a suit for ejectment, on the ground that by the mortgage the tenant had committed an act inconsistent with the purpose for which the land was let, within the meaning of s. 93 (*b*) of the North-Western Provinces Rent Act (XII of 1881). Prior to the institution of the suit, however, the tenant had the land and the mortgage-deed returned to him, and the mortgage was cancelled. The Court of first instance and the lower appellate Court dismissed the suit. The plaintiff appealed to the High Court.

Munshi *Kashi Prasad*, for the appellant.

The respondent was not represeuted.

OLDFIELD, J.—There is no case for appeal. Apart from the question whether executing a mortgage of his holding was an act within the meaning of s. 93 (*b*) of the Rent Act, on which it is not necessary to express an opinion, the finding is that the mortgage has been cancelled, and there is no cause of action left, and the penalty should not be enforced, with reference to s. 149. The appeal is dismissed.

MAHMOOD, J.—I concur in the order proposed by my learned brother Oldfield, and I am anxious to state my reasons for doing so, because I am aware of several cases in which an occupancy-tenancy has been brought to an end on account of erroneous views prevailing in the Mufassal Courts in regard to the meaning of cl. (*b*), s. 93 of the Rent Act. But assuming that the use of land by an occupancy-tenant in a manner inconsistent with the nature of his lease would put an end to his tenure, I am of opinion that the execution of a mortgage, such as that in the present case, is not "any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let." Under s. 9 of the Act, occupancy-rights cannot be transferred; and I have before now said in *Gopal Pandey* v. *Parsotam Das* (1) that

(1) I. L. R, 5 All. 121. (2) I. L. R., 4 All. 371.

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the term "transfer" as used in the section includes all kinds of mortgage, and hypothecation amongst others, and that the mortgage, being prohibited, is null and void. In this case we have a usufructuary mortgage, and this comes within the principle of the ruling of the Full Bench in *Naik Ram Singh* v. *Murli Dhar* (1). For the same reason, the mortgage, being illegal, would have no effect as against the zamindar, being a transaction opposed to the policy of the statute. What s. 93 (*b*) means by "any act or omission detrimental to the land" in a tenant's occupation, "or inconsistent with the purposes for which the land was let," may be thus illustrated. If an acre is given to a tenant for the purpose of cultivation, and he turns it into a tank, or builds upon it, that, in the view of the law, is an act "inconsistent with the purpose for which the land was let." But the execution of a mortgage, as in the present case, is not such an act. It would be illegal and void, but it would furnish no ground for ejectment. The Act does not give authority to end a tenure on any grounds other than those mentioned in the statute itself: in other words, I do not think that the occupancy-tenure can be brought to an end, except upon grounds clearly provided by the law. The appeal should therefore be dismissed.

Appeal dismissed.

FULL BENCH.

1885 (*February* 21.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

NARAIN DAS AND OTHERS (DEFENDANTS) *v* LAJJA RAM (PLAINTIFF) *

Appeal, abatement of—Death of plaintiff-respondent—No application for substitution of deceased's representative—Civil Procedure Code, ss. 368, 582—Act XV of 1877 (Limitation Act), sch. ii, No. 171B.

Held by the Full Bench (MAHMOOD, J., dissenting), that s. 582 of the Civil Procedure Code does not make the provisions of Chapter XXI, relating to the death of a defendant in a suit, applicable to the death of a plaintiff-respondent in an appeal, so as to render it obligatory on the defendant-appellant to make an application to the Court praying that the legal representatives of the deceased be

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* Second Appeal No. 634 of 1884, from a decree of C. F. Hall, Esq. District Judge of Bareilly, dated the 1st February, 1883, modifying a decree of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 6th September, 1882.

(1) I. L. R., 4 All. 371.

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made parties to the appeal; and that, where there has been no such application, the appeal does not abate.

Per PETHERAM, C. J.—The words "so far as may be," in the second clause of the first paragraph of s. 582, must be construed as meaning "so far as may be necessary to carry into effect the remedies contemplated by Chapter XXI."

Per MAHMOOD, J., *contra*, that the object of s 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of Chapter XXI, so as to make them applicable to appeals, and the words "appellant" and "respondent" as used in the section include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court; that Chapter XXI applies to cases where a plaintiff-respondent has died; and that, in such a case, and where no application has been made, within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates.

Also *per* MAHMOOD, J.—The word "defendant" as used in art. 171 B. of the Limitation Act (XV of 1877) must be taken to include a respondent, whether plaintiff or defendant in the suit.

Lakshmibai v. *Balkrishna* (1), *Rajmonee Dabee* v. *Chunder Kant Sandel* (2), and *Bai Javer* v. *Bathising Kesrising* (3), referred to.

THIS was a reference to the Full Bench by Petheram, C. J., and Duthoit, J., arising out of the following facts. One Lajja Ram brought a suit against certain persons in the Court of the Subordinate Judge of Bareilly. The Subordinate Judge dismissed the suit, and the plaintiff appealed from his decree to the District Judge. The District Judge altered the decree, and thereupon the defendants appealed to the High Court, making the plaintiff, Lajja Ram, respondent to the appeal. On the 19th November, 1883, the respondent Lajja Ram having in the meantime died, the appellants applied to the High Court to have the names of the three sons of the deceased substituted in his place. It was alleged in this application that Lajja Ram had died on the 5th June, 1883, but that the appellants had not received notice of his death until sixty days after it had taken place. On this application, an order was made directing notices to issue to the sons. These notices were returned unserved, as those persons were minors. On or about the 21st January, 1884, the appellants applied to the High Court that the minor sons of the deceased respondent should be substituted for him, and their mother appointed guardian *ad*

(1) I. L. R., 4 Bom. 654. (2) I. L. R., 8 Calc. 440.
(3) I L R. 9 Bom. 56.

litem. On the 14th February, 1884, the High Court made an order directing that the minors should be brought on the record under the guardianship *ad litem* of their mother, and that notice should issue to her. Notice was accordingly issued to the mother of the minors. On the 5th March, 1884, she made an application on behalf of her minor sons, in which she stated that Lajja Ram had died on the 2nd June, 1883, and prayed that, as the application of the appellants for the substitution of his legal representatives as respondents had been made after the time allowed by law, and the appeal had in consequence abated, the appeal should be dismissed. She subsequently supported this application by an affidavit showing that the appellants were aware of the death of Lajja Ram on the 5th June, 1883, and that their statement to the contrary was unfounded. At the hearing of the appeal, it was contended on behalf of the respondents that the appeal had abated, the application for the substitution of their names not having been made within the time allowed by law, and there being no sufficient cause for not making the application within such time. The Divisional Bench (PETHERAM, C. J., and DUTHOIT, J.) hearing the appeal referred the matter to the Full Bench, the order of reference being as follows:—

"We refer to a Full Bench the following question:—Assuming for the purposes of argument that there has been no valid application within the period prescribed therefor, specifying the name, description, and place of abode of any person whom the appellants allege to be the legal representative of the deceased respondent Lajja Ram, and that the appellants had not sufficient cause for not making the application within such period, has the appeal, or has it not, abated?"

Babu *Dwarka Nath Banerji*, and Babu *Jogindro Nath Chaudhri*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—This reference raises the question whether, in the case of an appeal by the defendant from the decree, the provisions of Chapter XXI of the Civil Procedure Code, with reference to the death of a defendant in a suit, are made applicable by s. 582

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of the Code, so as to render it obligatory on the defendant appellant to ascertain who are the personal representatives of the deceased plaintiff, and to make them parties to the suit; and whether, if he does not do so, the appeal abates.

In order to answer this question, it is necessary to examine the provisions of Chapter XXI, and to ascertain whether they can have any application to such a state of things. Ss. 363, 364, 365, 366, and 367 relate to cases in which the *plaintiff* has died, and provide a machinery by which, when this has happened and the remedy survives,—*i.e.*, when his estate is entitled to the amount claimed —his personal representatives, or, in other words, the persons entitled to receive and give a receipt for the debt or damages, shall *make themselves* parties to the suit before it can proceed. These provisions are for the protection of the defendant, to ensure that the payment by him shall be made to the proper person, and that no future claim shall be made against him in respect of the same matter. S. 368 provides for the death of the defendant, where the cause of action survives, and provides a machinery by which a *plaintiff* who has made a claim and brought an action against a person who has died pending the suit, may enter the name of some person who represents the property of the defendant, in the place of the name of the original defendant, and with a view of ultimately getting execution against the property of the deceased in the hands of the new defendant. The object of this legislation is obvious. The plaintiff by his suit seeks to recover something, and it would be ridiculous for the suit to proceed unless there was some person from whom the subject-matter of the suit could be recovered.

The question then is—Are these provisions applicable to the case of a defendant-appellant, who claims no debt or damages, but only to have a decree which has been passed against him reversed? In my opinion they are not. All the provisions of Chapter XXI relate to the addition of parties by the plaintiff, who would have the means of knowing who were the proper persons to add, and who, for the reasons I have before stated, is bound in the interests of justice to make the additions. But none of these reasons relate to the case of a defendant-appellant who did not set the litigation on foot, and is only interested in getting rid of the decree against him.

It appears to me, therefore, that the words "so far as may be" in s. 582 must be construed as meaning "so far as may be necessary in order to carry into effect the remedies contemplated by Chapter XXI." And this view appears to me to be strongly supported by the terms of the Limitation Act. Art. 171 of sch. ii of that Act prescribes a period of limitation for applications made under s. 363 or s. 365 of the Civil Procedure Code, and this period runs from "the date of the plaintiff's or *appellant's* death." Now ss. 363 and 365 relate to the death of a plaintiff. Then art. 171 *B* provides the limitation period for applications, under s. 368 of the Code, "to have the representative of a deceased *defendant* made a defendant," and this period runs from "the date of the *defendant's* death." Now, if the contrary opinion to that which I hold were correct, this provision would correspond with the other, and the period would run from "the date of the *defendant's or respondent's* death." But we find that the Legislature has taken care to say nothing of the sort; nor, in my opinion, could it have been said without results which would be not only meaningless but mischievous. For these reasons, my answer to the reference is in the negative.

STRAIGHT, J.—At the hearing of this reference I was disposed to think that the question put by it ought to be answered in the affirmative. But a more careful consideration of the terms of s. 368 of the Civil Procedure Code has brought my mind to the opposite conclusion. The whole question which we have to consider is whether, in a case where a plaintiff-respondent has died, and the defendant-appellant has failed to make an application that the name of the plaintiff's legal representative be entered on the record as respondent in his place, the appeal, in consequence of such failure, abates. It will, I presume, be generally conceded that a rule so stringent as one laying down that in certain circumstances an appeal shall abate, must be strictly construed. Now, s. 368 provides that "when the *plaintiff* fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period." And we are asked to read this rule as if it were that "when a *defendant-appellant* fails to make such application within the period prescribed therefor, the

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appeal shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period." It is important here to notice the manner in which both s. 368 and the existing provisions of the Limitation Act have been brought into their present form. In Act X of 1877, there was no provision corresponding to that contained in the last paragraph of s. 368 of the present Code. That clause was introduced into the law of Civil Procedure by s. 60 of Act XII of 1879; and the same Act also contained provisions amending the Limitation law, By s. 108, the words in art. 171 of Act XV of 1877, "or appellant" were added in the first column, and, in the third, the words "or appellants" were inserted. S. 582 of Act X of 1877 was amended by s. 88 of Act XII of 1879, which substituted for the first paragraph of the former section the following words :—"The appellate Court shall have in appeals under this chapter the same powers, and shall perform as nearly as may be the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chapter V, and in ss. 363 and 365 the word "*plaintiff*" shall be held to include an appellant." In other words, it is obvious that, at the time when the last clause of s. 368 was introduced, the rule that an appeal should, in certain circumstances, abate, was confined to cases in which a plaintiff or an appellant or a defendant had died ; and this view is supported by the omission in the third column of art. 171 *B* of the Limitation Act, relating to applications made under s. 368 of the Civil Procedure Code, of any reference to the death of a respondent. It therefore appears to me impossible to say that the appellant in the present case has failed to make the application "within the period prescribed therefor," because no period for making such an application is in fact prescribed at all ; and, for this reason, I concur with the learned Chief Justice in answering the question referred to the Full Bench in the negative.

OLDFIELD, J.—I am of the same opinion.

BRODHURST, J.—I am of the same opinion.

MAHMOOD, J.—I regret to say that I have been obliged to come to a different conclusion from that of the majority of the Court. It is necessary, in the first place, to consider what was

the policy of the Legislature in passing s 582 of the Civil Procedure Code. I do not think that I shall be violating any rule of judicial etiquette if I say that I am responsible for the latter part of the first paragraph of that section, because it was at my suggestion that the Legislature adopted those words, and I mention this circumstance because it appears that the principle underlying those words still meets with the approval of the Legislature. Now, the meaning of the terms used in the statute appears to me clear enough. Chapter XXI relates to proceedings which arise out of the death, marriage, and insolvency of parties to a suit. The object of s. 582 is to obviate the necessity of repeating the provisions of Chapter XXI, so as to make them applicable to appeals. The part of s. 582 which we now have to consider is the following :—" In Chapter XXI, so far as may be, the words ' plaintiff,' ' defendant,' and ' suit,' shall be held to include an appellant, a respondent, and an appeal, respectively, in proceedings arising out of the death, marriage, or insolvency of parties to an appeal." I confess that, applying the recognized principles of the construction of statutes, I am altogether unable to hold that the word " appellant " in the passage I have just read means a *plaintiff*-appellant only, any more than I can hold that by " respondent " a *plaintiff*-respondent alone is meant. It has been said that the position of a *defendant*-appellant is materially different from that of a *plaintiff*-appellant in reference to the purposes for which Chapter XXI was enacted. I confess that I am unable to take this view. I understand one of the principles of jurisprudence to be this—that no man is entitled to come into Court without some cause of action, which means the existence of a right, and some injury or violation of that right. But for the purpose of coming into Court, it is necessary for one who complains that his right has been violated, to implead those whom he accuses. If he cannot do this, his suit will not lie, for the presumption of law is, that everything has been done rightly, or rather rightfully, till the contrary is shown. The law does not presume wrong in the conduct of the parties any more than in the judgments of the Courts, and it follows that where the " injury," if I may call it so, is a wrong judgment, or a judgment by which a party to the suit is aggrieved or injured, it is only going one step more in the same

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direction, and reasoning upon a close analogy, to hold that those against whom the proceedings in appeal are taken should be impleaded by the person taking the proceedings, that is, the appellant. The principle of *audi alteram partem* applies equally to suits and to appeals. Indeed, the express provisions of s. 553 of the Code leave no doubt in my mind that the provisions prescribed for bringing a respondent before the Court are identical with those provided for a defendant. It is not only in that section that analogy exists between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court. The whole Code seems to me to maintain the analogy, which was natural as a matter of drafting, for the purpose of obviating unnecessary repetition of rules. And I think I can safely say that there is not a single clause in the Code which, in this respect, distinguishes the position of a defendant-appellant from that of a plaintiff-appellant, or the position of a defendant-respondent from that of a plaintiff-respondent. It therefore appears to me that where a defendant against whom a decree has been passed, says that the decision is wrong, and appeals against it, he is bound, in the first place, to bring the necessary parties before the Court by impleading them as respondents, and, in the event of the respondent's death, to apply that the name of the legal representative of the respondent be brought upon the record.

As to the difficulty which has been suggested with reference to the use of the word "defendant" only, in art. 171B, sch. ii of the Limitation Act, the explanation seems to me to be simple. The clause was introduced by s. 108 of Act XII of 1879, which also amended the Civil Procedure Code of 1877. The reference then to s. 368 of the Code was no doubt to the section of the Code of 1877 as amended, and the word "defendant" was no doubt to be interpreted in the sense of that section. But by the passing of the present Code, Act XIV of 1882, the word "defendant" as used in the clause of the Limitation Act must, by reason of the second paragraph of s. 3 of the Code, be understood in the sense in which it is used in s. 368 of the *present* Code, which must, of course, for the purposes of proceedings in appeal, be read with s. 582. The word "defendant" therefore, as it occurs in art. 171B of the Limitation Act, must be taken to include a respon-

dent, and there is nothing to suggest that any distinction is intended between a *plaintiff*-respondent and a *defendant*-respondent. Now, there is one more consideration in favour of my view. There is nothing, either in the Civil Procedure Code or in the Limitation Act, which provides for, or imposes the duty on, the legal representative of a deceased respondent (whether plaintiff or defendant in the original suit) to apply to the Court for having his name placed on the record in substitution for the deceased party. It is unnecessary to determine whether such an application could be entertained, and, if so, what limitation would govern such an application. The Bombay Court in *Lakshmibai* v. *Balkrishna* (1) held that no such application could be made against the wish of the appellant; but, be that as it may, the question remains how an appeal is to proceed when the defendant-appellant fails or declines to make such an application as is contemplated by s. 368, to bring some one upon the record to represent the deceased *plaintiff* respondent. I say, with due deference, that, according to the opinion of the majority of the Court, there can be only two alternatives—either the appeal must be heard and determined in the absence of the opposite party, or it must remain for ever upon the appellate file without being subject either to dismissal or to abatement. But it seems to me that the Code contemplates no such results, and a close comparison of the language of s. 582, as it stood in the Code of 1877, with the amendments introduced by s. 88 of Act XII of 1879, and again with the language of the section as it stands in the present Code, goes to support my view.

I am consequently of opinion that, under the circumstances contemplated by the present reference, the appeal would abate, and that the answer which we should give is the affirmative. I may add in conclusion that, among the cases cited during the argument, I regard *Lakshmibai* v. *Balkrishna* (1), and *Rajmonee Dabee* v. *Chunder Kant Sandel* (2), as authorities supporting the view which I have expressed, and I do not regard the decision of the Bombay Court in *Bai Javer* v. *Hathising Kesrising* (3), as inconsistent in principle with what I have said.

(1) I. L. R., 4 Bom 654. (2) I. L. R., 8 Calc. 440.
(3) I L. R, 9 Bom. 56.

1885
February 23.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

GANGA DIN AND OTHERS (DEFENDANTS) v. KHUSHALI (PLAINTIFF)*.

Execution of decree—Imperfect attachment of immoveable property—Private alienation after such attachment not void—Civil Procedure Code, ss. 274, 276, 295, *sch. IV., No.* 141.

A judgment-debtor whose property had been attached in execution of a money decree, sold the property, and out of the price paid into Court the amount of the decree, and prayed that the attachment might be removed While the attachment was subsisting, and prior to the sale, the holders of other money decrees against the same judgment-debtor preferred applications, purporting to be made under s 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditor. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bona fide* transaction, entered into for valuable consideration.

Held that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in manner provided by s. 274 of the Civil Procedure Code, their claims were not entitled to the protection conferred by s. 276 against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that t e sale by the judgment-debtor was valid; and that execution of the decrees could not take place.

Per MAHMOOD, J.—That s. 276 of the Civil Procedure Code being a restriction of private rights of alienation, should be strictly construed; that before property can be subjected to such restriction, there must be a perfected attachment; that the orders passed under s. 295 did not amount to such attachment; and that, even assuming them to amount to such attachment, they, not having been duly intimated and notified, could not make the prohibition of s. 276 applicable to the case. *Mahadeo Dubey* v. *Bhola Nath Dichit* (1), *Anand Lall Dass* v. *Jullodhur Shaw* (2), *Rameswar Singh* v *Ramtanu Ghose* (3), *Indro Chunder Baboo* v. *Dunlop* (4), *Gobind Singh* v. *Zalim Singh* (5), and *Gumani v. Hardwar Pandey* (6), referred to.

Also *per* MAHMOOD, J.—While s. 295 of the Code gives a special right to judgment creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, and that its result should appear in assets realized by the sale, and therefore, until the sale takes place, no such right can be enforced. *Bishen Chunder Surma Chowdhry* v. *Mun Mohinee Dabee* (7), referred to.

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* Second Appeal No 329 of 1884, from a decree of A. Sells, Esq, District Judge of Cawnpore, dated the 20th December, 1883, affirming a decree of Maulvi Farid ud-din, Subordinate Judge of Cawnpore, dated the 26th June, 1883.

(1) I. L. R., 5 All. 86.
(2) 14 Moo I. A. 543.
(3) 4 B. L. R., A. C., 24.
(4) 10 W. R. 264.
(5) I. L. R., 6 All. 33.
(6) I. L. R., 3 All. 698.
(7) 8 W. R. 501.

ONE Manni Ram, the holder of a decree for money against one Chhubba, dated the 17th May, 1881, applied on the 19th August, 1881, for the attachment and sale in execution of the decree of certain immoveable property belonging to his judgment-debtor, and an order for the attachment of the property was made in September following. On the 3rd January, 1882, Chhubba executed a deed of sale of the property in favour of Khushali, the plaintiff in this suit, and, out of the price paid for the property, paid into Court the amount of Manni Ram's decree, and prayed that the atttachment might be removed. The Court executing the decree refused to remove the attachment until the holders of certain other money-decrees against Chhubba had been paid. One of these decree-holders, Ganga Din, had, on the 31st August, 1881, after Manni Ram had applied for the attachment and sale of the property in execution of his decree, preferred an application, purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between him and Manni Ram, the attaching creditor. The other decree-holders had subsequently made similar applications. In consequence of the Court's refusal to release the property from attachment, Khushali brought this suit against the decree-holders in question to have it declared that the sale to him was valid, and that the property was not liable to be sold in execution of their decrees.

Both the lower Courts concurred in decreeing the claim, holding that the deed of sale executed by Chhubba was a valid transaction; that it conveyed all his rights in the property; that therefore the holders of the decrees against Chhubba could not treat the property as still his; and that consequently execution could not take place.

The defendants appealed to the High Court, contending (*inter alia*) that the sale-deed executed by Chhubba on the 3rd January, 1882, was invalid, with reference to the provisions of s. 276 of the Civil Procedure Code.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellants.

Munshi *Hanuman Prasad* and Pandit *Bishamber Nath*, for the respondent.

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OLDFIELD, J.—The *bonâ fide* character of the sale to the plaintiff of the property in suit on the part of Chhubba, the judgment-debtor of the appellants, has been found by the lower appellate Court, and is not open to the objections taken in appeal.

The question that remains for determination is whether, at the time of the sale to the plaintiff, the property was under attachment in execution of the appellants' decrees, and, under the provisions of s. 276 of the Civil Procedure Code, the sale to the plaintiff is void as against the appellants' claims under their decrees.

It appears that the property had been attached on the application of one Manni Ram in execution of his decrees against Chhubba on the 17th May, 1881, and some of the appellants who held decrees against Chhubba applied to attach the property in execution of their decrees while the attachment under Manni Ram's decree was subsisting and prior to the auction-sale; and further asked that, under s. 295 of the Civil Procedure Code, the proceeds of the sale might be rateably divided among the decree-holders. No order, however, for attachment was made, as required by the provisions of s. 274, on their applications.

Now, s. 276 provides that when an attachment has been made by actual seizure or written order duly intimated and made known in the manner aforesaid (that is, as required by s. 274), any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

What is here contemplated is the protection of claims which are enforceable under an attachment made according to the provisions in s. 274,—that is, in the case of immoveable property, which is that in dispute here, by written order duly prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise, the order being proclaimed by beat of drum, and in other manner as directed by the section; and, with reference to the form 141 in sch. iv. of the Act, the particulars of the claim of the attaching creditor must be set out in the proclamation.

It is the claim of the attaching creditor who has made the attachment set out in the order of attachment which is enforceable

under the attachment, and which is protected; and to enable creditors to have the advantage of an attachment there must be separate attachments in each case by written order duly intimated and made known as required by s. 274, giving the particulars of the claims of the attaching creditors.

The reason is obvious, to enable those dealing with the property to become acquainted with the claims which are protected by the attachment.

For instance, as in this case, a person buys property with the knowledge of the attaching creditor's claim, which he satisfies, but it would be inequitable to make him liable for claims which were not promulgated at the attachment, and of which he knew nothing.

The plaintiff has satisfied the claim of Manni Ram, and is in a position to resist the sale of the property to satisfy the claims of the appellants, which, for the reasons given, are not claims enforceable under the attachment which was made.

The appeal is dismissed with costs.

MAHMOOD, J.—Five pleas have been raised in appeal; but when I first heard what these were, I was convinced,—and I adhere to the opinion—that the last four are not such as could properly be entertained at this stage, since they only raise questions as to the evidence and as to the merits of the case. Both the Courts have found that the sale-deed of the 3rd January, 1882, now in question, was entered into *bonâ fide* for valuable consideration, and conveyed the vendor's rights in the property, and that no fraud, collusion or *mala fides* of any kind had been established. So far as regards this part of the case, we cannot interfere with the decrees of the lower Courts. There is, however, one part of the appeal—that brought forward by the first plea—which raises a question of law, namely, whether, even assuming the deed to have been a *bonâ fide* document, it was not void with reference to the provisions of s. 276 of the Civil Procedure Code. Before entering upon this question, I wish to observe that all the decrees held by the present defendants are simple money-decrees.

Now, in passing any judgment in connection with the construction to be placed on s. 276, it is important to refer to an earlier section in the Code—s. 274,—which provides for the attachment

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of immoveable property, when it is the first step in execution of a simple money-decree against the person owning the property. It is as follows:—"If the property be immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise." This section corresponds to s. 235 of the old Code of 1859, and to the last part of s. 239 of the same. I wish to refer to these sections because they are interpreted by several rulings, to some of which I shall presently refer. Then we have s. 276 of the present Code, which is the most important provision for the purposes of this case. It says:—"When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt, or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void *as against all claims enforceable under the attachment.*" The language of this section is practically the same as that of s 240 of the Code of 1859, the words which I have emphasized being added to the present section. But notwithstanding the change of language, I do not think, so far as the present point is concerned, the law has been altered by the present Code. And I say this because my view is supported by a ruling of the Privy Council which, as I understand it, is as much applicable in principle to s 276 of the present Code as it was to s. 240 of the old Code to which it related. Indeed, the words which I have emphasized were most probably inserted in consequence of that ruling. But before considering the effect of that ruling, I wish to refer to a somewhat recent Full Bench decision of this Court in *Mahadeo Dubey* v. *Bhola Nath Dichit* (1). The judgment in that case was delivered by my brother Straight, and concurred in by the rest of the Court, including myself. It was there ruled that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and, where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void. I understand this ruling to apply as well to the old as to the present

(1) I. L. R., 5 All. 86.

Code, because a simple money claim seems to me as, so to speak, "floating", until the attachment of some particular property belonging to the debtor fixes the debt to some specific part of the debtor's property—a fixation which can be effected only by making the attachment according to law; and that I take to have been the reasoning of the Full Bench. I now go back to s. 274 of the Code, in order to bring out the most important question in this case. What was the object of the Legislature in enacting s. 274 in these three separate paragraphs, and in these specific terms, and what bearing has this object upon the question now before us? S 274 provides for the attachment of immoveable property. The attachment is to be made in certain particular ways, and one important direction is, that notice be given not only to the judgment-debtor not to alienate the property, but also to the *public* not to *accept* any alienation from him. The object of the provisions is two-fold; and this view of the matter is supported by the provisions of s 644 when considered with the fact that No. 141 of the fourth schedule of the Civil Procedure Code correctly provides an exact form to be employed for the purpose of carrying out the requirements of s. 274. It says:—"Whereas you (the judgment-debtor) have failed to satisfy a decree passed against you ..... it is ordered that you be, and you are hereby, *prohibited and restrained*, until the further order of this Court, *from alienating the property* specified in the schedule hereunto annexed, by sale, gift or otherwise,"—so far the words are a repetition of s. 274,—"and that *all persons* be, and that they are hereby, prohibited from *receiving* the same by purchase, gift or otherwise." I have emphasized the words bearing upon the present point. Now, it is clear to my mind that s. 276 is a distinct interference with private rights of alienating property, and I believe it is a fundamental principle relating to the interpretation of statutes, that where the Legislature interferes in this manner, the provisions enabling it to do so must be not only carefully but *strictly* construed. Their Lordships of the Privy Council in *Anand Lall Dass* v. *Jullodhur Shaw* (1) in construing the corresponding s. 240 of the Code of 1859 which I have already cited, made the following observations:—"The question is whether those words—'any private alienation of the property attached, whether by sale, gift or

(1) 14 Moo. I. A 513.

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otherwise, shall be null and void'—are to be taken in the widest possible sense as null and void against all the world, including even the vendor, or to be taken in the comparatively limited sense attached to them by the Courts in India? Their Lordships adopt the language of the Chief Justice, who, in the judgment of the Court, expresses his opinion that the object was to make the sale null and void, so far as it might be necessary to secure the execution of the decree, relates *only* to alienation which would affect *the creditor who obtained the attachment.* That appears to their Lordships to be the true meaning of the section. It could scarcely be held—in fact, it was scarcely maintained in argument—that a sale made to a *bonâ fide* purchaser by the vendor could be set aside by the vendor himself; the words must therefore necessarily be read with some limitation It appears to their Lordships that their construction must be limited in the manner indicated by the Chief Justice, on the ground that they were intended for the protection of *the creditor who had obtained an execution,* and *not* for the protection of all persons who at *any future time* might possibly obtain execution." I have emphasized the important words, and applying these observations to this case, I must now consider whether such conditions existed as could invalidate the deed of the 3rd January, 1882. I have already said that a perfected attachment is necessary to render these restrictions upon private rights effective so as to prevent the owner from dealing with his property as he might have done before attachment. In support of this view, I may refer to two cases—*Rameswar Singh* v. *Ramtanu Ghose* (1) and *Indro Chunder Baboo* v. *Dunlop* (2). I need not refer to them at length, but they are authorities for the view that before property can be made liable to these restrictions, there must be a perfected attachment. They amount practically to an enunciation of the same principle as was laid down by this Court in *Mahadeo Dubey* v. *Bhola Nath Dichit* (3), to which I have already referred.

Now, if a sale in execution of decree, without a previous attachment is *ab initio* void, it follows that a private sale, where there has been no such perfected attachment, is valid. Of course, as a matter of logic, the truth of a proposition does not involve the

(1) 4 B. L R, A. C, 24. (2) 10 W. R. 264.

(3) I L. R., 5 All. 86.

truth of what may be called its converse; but in a case of this description, I think that the two propositions depend upon the same principle, and that if one of them is true, the other must be true also. Indeed, the judgment of my brother Tyrrell in *Gobind Singh* v. *Zalim Singh* (1) goes almost a greater length to support my view; for there the private alienation by the judgment-debtor, though made during the subsistence of a valid attachment, was upheld, on the ground that although the interests of the auction-purchaser, who sought to avoid the private alienation, originated in an attachment made in execution of the same decree, yet as the former attachment had been infructuous, and the latter attachment, which resulted in the auction-sale, was made subsequent to the private alienation, such alienation could not be avoided by such auction-purchaser.

In connection with this part of the case, if it could be shown that the present defendants had by reason of their applications obtained a valid and perfected attachment in execution of their decrees *before* the sale of the 3rd January, 1882, there would be no difficulty. But I concur in the reasoning of my brother Oldfield in *Gumani* v. *Hardwar Pandey* (2), where he held that the prohibition provided by s. 276 could not have effect unless there had been a regular attachment, and that an alienation made after attachment not "*duly intimated and made known*" as required by s. 276, would not be vitiated. The rule seems to me to rest upon a foundation similar in principle to the equitable doctrine of "*notice*" when applied to *bonâ fide* transferees for value. And applying this rule to the present case, it has to be considered whether the application made by Ganga Din on the 31st August, 1881, and the order passed thereon, amounted to such an attachment as my brother Oldfield had in view in the case which I have just mentioned. There can be no doubt that neither the application nor the order amounted to such an attachment. The application was made under s. 295, and so were the other subsequent applications by the decree-holders—the defendants in the present litigation.

That section provides for the state of things which was formerly met by ss. 270 and 271 of the Code of 1859. The provisions of the former of these sections, which gave priority to the

(1) I. L. R. 6 All. 33. (2) I. L. R., 3 All. 693.

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attaching creditor for satisfaction of his decree as against other decree-holders, have not re-appeared in s. 295 of the present Code; the material effect of the change, so far as this point is concerned, being that, whilst under the old Code the first attaching creditor was to be paid in full, and the others rateably, under the rule of distribution provided by the present Code, no such priority exists, and any decree-holder who applies to the Court is entitled to participate rateably, subject, of course, to the other rules provided by the section. The substantial provisions of s. 271 of the old Code have, however, re-appeared in an *amplified* form, in s. 295 of the present Code, and whatever the change of law may have been in other respects, the principle, so far as the matter now under consideration is concerned, has certainly undergone no change. I can explain this in the best manner by quoting another passage from the judgment of the Lords of the Privy Council in the case which I have already cited :—"Reference has been made to s. 271, which is to this effect—'If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof.' This section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not, under the circumstances, a private sale was valid."

Now, reading s. 295 of the present Code in the light of these observations, there can be no doubt that whilst the section gives an especial right to judgment-creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, that its result should appear in assets realized by the sale, and so, until the sale takes place, no such right can be enforced. Now the first Court, in dealing with the defendant's application, issued no proclamation under s. 274: no order was passed prohibiting the judgment-debtor from alienating the property. The public were not warned against accepting a conveyance from the judgment-debtor, and under these circumstances there was neither a perfected attachment nor

any such prohibition as could render s. 276 applicable to the case. In support of what I have just said, I may mention the case of *Bishen Chunder Surma Chowdhry* v. *Mun Mohinee Dabee* (1) in which it was held that s. 270 of the old Code, corresponding to a part of the present s 295, did not apply to a case in which property had *not* been sold in execution of a decree.

I hold therefore that because the application of the 31st August, 1881 was not an application for execution by attachment of the property in suit, because it did not end in an order for attachment, because the order passed, even supposing it were an order for attachment, was never duly intimated and notified, there was no such attachment of the property as could render the prohibitions of s. 276 available to the present defendants for the purposes of executing their decrees against the property sold under the sale-deed of 3rd January, 1882.

There was Manni Ram's decree under which the property was attached; but that attachment could only invalidate such alienations as could be taken to be in derogation of his rights, so far as the decree, in execution whereof he attached the property, is concerned. But since the defendants never properly attached the property in execution of the decrees which they now seek to execute against that property, since that property has by a valid sale passed from the hands of their judgment-debtor and become the property of the plaintiff—a *bonâ fide* purchaser for value—they cannot either avoid the deed of sale or execute their decrees against the property. For these reasons, the appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

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March 18.

RODH MAL (DEFENDANT) *v.* RAM HARAKH AND ANOTHER (PLAINTIFFS)*

Mortgage—Purchaser of part of mortgaged property without notice—Suit for sale of whole property in satisfaction of mortgage—Marshalling—Apportionment.

The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bonâ fide* purchaser for value, without notice, of a portion of property the whole of which was subject to a prior incumbrance. *Tulsi*

* Second Appeal No. 1590 of 1883, from a decree of G. E Knox, Esq, District Judge Mirzapur, dated the 31st August, 1883, affirming a decree of Munshi Madhofal, Munsif of Mirzapur, dated the 23rd January, 1883.

(1) 8 W. R. 501.

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Ram v. *Munnoo Lal* (1), *Nowa Koer* v. *Abdul Rahim* (2), *Bishonath Mookerjee* v. *Kisto Mohun Mookerjee* (3), and *Khetoosee Cherooria* v. *Banee Madhub Doss* (4), referred to.

The mortgagees of two properties, one of which had, subsequently to the mortgage, been purchased for value *bonâ fide* by one who had no notice of the incumbrance, brought a suit to enforce their lien against both the properties originally owned by the mortgagor, impleading as defendants both the mortgagor and the purchaser.

Held that, while there was no doubt that, if the purchaser was compelled to pay more than the share of the mortgage debt apportioned on the property purchased by him, he would be entitled to contribution, yet, in a suit so framed, and having regard the array of parties, such an apportionment could not be made at the stage of second appeal.

THE facts of this case were as follows:—Jaipal, Bindraban, Parmanand, and Ramanand owned a three annas two pies and eight karants share in a village called Misarpura, and a one anna seven pies and four karants share in a village called Bhawalpura. The four persons owned these shares in the following proportions:—Jaipal was owner of one-third only, Bindraban was owner of one-third only, Parmanand and Ramanand owned the remaining one-third. These persons, on the 17th July, 1875, made a simple mortgage of their rights and interests in the above-named villages to the plaintiffs in this case, Ram Harakh and Sheo Prasad. Subsequently, on the 20th July, 1877, the rights and interests of Jaipal in Bhawalpura were sold in execution of a simple money-decree, and purchased by Rodh Mal, defendant in this case, the equity of redemption in the other village, namely, Misarpura, remaining in the hands of Jaipal. On the 15th April, 1878, Bindraban made a simple mortgage of his third share in both the villages to the same mortgagees. On the same day, Parmanand and Ramanand made a similar mortgage of their share in both the villages in favour of the same mortgagees. The effect of these mortgages was to pay off the money due by them on account of the mortgage of the 17th July, 1875. The present suit was instituted by Ram Harakh and Sheo Prasad, with the object of enforcing the mortgage of the 17th July, 1875, to the extent of the third share originally owned by Jaipal in both the villages. To this suit were impleaded Jaipal himself and Rodh Mal as the purchaser of his rights and interests in mauza Bhawalpura. There were various pleas set up by the defendant

(1) 1 W. R., 353.
(2) W. R., January to July, 1864, p. 374.
(3) 7 W. R., 483.
(4) 12 W. R., 114.

Rodh Mal, but it is necessary to notice only the second and fourth, which related to the questions which required determination in second appeal. These pleas, in substance, were—(1) that the defendant-appellant having purchased the property for value and without notice of the prior mortgage, it (the property) was not liable to be sold again to satisfy the mortgage of 1875; (2) that even if it were liable to be so sold, it was only liable to the extent of the mortgage-debt that might be apportioned on the property purchased by the defendant-appellant. Upon this state of things, the Court of first instance decreed the claim, and the lower appellate Court dismissed the appeal of the defendant Rodh Mal, and confirmed the decree. The defendant appealed to the High Court.

Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad*, and Munshi *Kashi Prasad*, for the respondents.

MAHMOOD, J.—In the second appeal before us, two questions have been argued, the first one relates to marshalling, and the second relates to contribution or apportionment. It is admitted that when this property was brought to sale, the mortgage of the 17th July, 1875, was not notified, and no evidence was adduced by the plaintiff to show that the defendant-appellant had notice of the aforesaid mortgage. Is the defendant-appellant then entitled to a decision in his favour on the two questions? In the first place, I refer to the formulation of the rule in s. 81 of the Transfer of Property Act (IV of 1882), not because the rule is literally applicable to this case (which it is not), but because the principle of this rule applies equally to the facts of the present case. Now s. 81 runs as follows :— "If the owner of two properties mortgage them both to one person, and then mortgages one of the properties to another person, who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, so far as such property will extend, but not so as to prejudice the rights of the first mortgagee, or of any other person having acquired for valuable consideration an interest in

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either property." This of course relates only to a puisne mortgage of a portion of the property, the whole of which was subject to a prior mortgage; but there is no reason why this doctrine should not be applied to the case of the defendant-appellant. The rule has been followed in several cases, and I now proceed to refer to some of the cases which are important. The first case I would refer to is the case of *Tulsi Ram* v. *Munnoo Lal* (1). In this case the mortgagor, a few days after hypothecating a village as security to the Government, mortgaged the same village with other property to the plaintiff in that case. The deed of mortgage was immediately registered, but the security-deed was not registered till long afterwards, and under the Registration Act, XIX of 1841, the Court in that case considered that the mortgage-deed had priority over the security-bond. The village having been sold by the Collector on account of a sum due under the security-bond, it was held by Morgan (now Sir Walter Morgan) and Shumboo Nath Pandit, JJ., that though the purchaser took subject to a prior mortgage yet the mode in which the property had been dealt with by the mortgagor entitled the purchaser to require that the other property should first be applied in satisfaction of the mortgage-debt. The second case that I would refer to is the case of *Nowa Koer* v. *Abdul Rahim* (2). In that case Mr. Justice Jackson is reported to have said as follows:—"It appears that the plaintiff in this case had a lien on three estates belonging to the debtor, and that a third party, having obtained a decree for money due from the same debtors, recovered the money by the sale of one of the plaintiff's three mortgaged estates. This sale does not release that estate from the mortgage, but it forces the plaintiff to take measures, in the first place, to recover the amount due to him from the remaining estates included in his mortgage-deed. If any balance remains after he has realized all which he can realize from these two remaining estates, he can then return to the third estate to recover the balance. No injustice is done to the plaintiff by requiring him to take satisfaction out of funds which are within his power for this purpose, and so placed by the deed; while, on the other hand, very great injustice might be done to other parties by allowing the plaintiff to proceed against the estate which has

(1) 1 W. R., 353. (2) W. R, January to July, 1864, p. 374.

been already sold." And then, referring to facts very similar to those that exist in this case, the learned Judge went on to say:—"If, then, the plaintiff has entered into any new and subsequent contract, varying the terms of the first contract, he cannot thereby injure the rights of parties who have succeeded to the interest of his debtor prior to the subseqnent contract." The principle of equity on this subject is very clearly laid down in the text-books (chap. XII, Story's *Equity Jurisprudence*). There is another case—*Bishonath Mookerjee* v. *Kisto Mohun Mookerjee* (1)—but I wish to rely principally on the judgment of Norman, J., in that case, who has taken the same view as I take in this case. After laying down this rule with reference to a puisne mortgagee, that learned Judge proceeds to observe (p. 484)—"Of course, a subsequent purchaser of one of the estates has just as great an equity as an incumbrancer." There is another case—*Khetoosee Cherooria* v. *Banee Madhub Doss* (2), in which the learned Judges doubted whether the doctrine of marshalling of securities should be introduced in this country. There is, however, no authority which goes the other way. I hold that the equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bonâ fide* purchaser for value without notice, such as the defendant-appellant in this case.

In Mr. Justice Story's work on *Equity Jurisprudence*, vol. I, there is a note at page 613 to the following effect:—"Where a judgment-debtor owned two tracts, subject to the lien of the judgment, and sold one tract, the vendee had a right to have the other tract first applied to the judgment, and this right is paramount to that of subsequent creditors having a lien only on the unsold property, to have the prior creditor, who had a lien on both, satisfy himself from the estate which had been sold.—McCormick's Appeal 57, Pem. St. 54. And that *bonâ fide* purchasers from judgment-debtors have a right to have the debts satisfied from the unsold estate or that last sold."

I have not been able to refer to the authorities upon which this proposition is based, but this view of the law, as I have already shown, has been taken in various cases in this country. It is clear to me that the decree of the lower Courts cannot stand in

(1) 7 W. R., 483. (2) 12 W. R, 114.

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the present form. I must now consider the second question—as to apportionment. There is no doubt that if the defendant is compelled to pay more than the share of the debt apportioned on the property, he is entitled to contribution. But the question in this case is, whether in a suit framed like the present, in which the plaintiff sues to recover a certain sum of money, and having regard to the array of parties, such a question can be determined? I am of opinion that such an apportionment cannot be made in this case at this stage after the manner in which it has been tried. In my opinion, the appeal should be partially decreed, and the decrees of the lower Court modified to the effect that the rights and interests of the defendant-appellant in mauza Bhawalpura should not be brought to sale till the plaintiff has, in the first instance, resorted to the share of Jaipal in Misarpura for recovering the mortgage-money, and that the share of the defendant-appellant be brought to sale for the purpose of recovering such balance as may remain due after the sale of Jaipal's rights in Misarpura. I would modify the decree of the lower Courts accordingly, but make no order as to costs.

BRODHURST, J.—I concur in modifying the decree of the lower appellate Court as proposed by my learned colleague.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

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MUHAMMAD AWAIS (PLAINTIFF) *v.* HAR SAHAI (DEFENDANT).*

Muhammadan Law—Inheritance—Devolution not suspended till payment of deceased ancestor's debts.

A creditor of *A*, a deceased Muhammadan, under a hypothecation bond, obtained a decree on the 20th December, 1876, for recovery of the debt by enforcement of lien against *M*, one of *A's* heirs, who alone was in possession of the estate; and, in execution of the decree, the whole estate was sold by auction on the 21st March 1878, and purchased by the decree holder himself *J*, another of *A's* heirs was not a party to these proceedings. On *J's* death, her son and heir *A. H.* conveyed to *M. A* the rights and interests inherited by him from his mother, namely, her share in *A's* estate The purchaser of the share thereupon brought a suit against the decree-holder for its recovery.

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* Second Appeal, No 736 of 1884, from a decree of Muhammad Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 5th April, 1884, affirming a decree of Maulvi Ahmad Hasan, Munsif of Amroha, dated the 21st September, 1883.

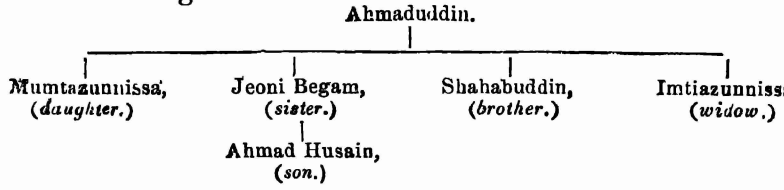
Held that, immediately upon the death of *A*, the share of his estate claimed in the suit devolved upon *J*; that, she being no party to the decree of the 20th December 1876, her share in the property could not be affected by that decree, nor by the execution sale of the 21st March 1878; that upon her death that share devolved upon her son, who conveyed his rights to the plaintiff; that the plaintiff was therefore entitled to recover possession of the share which he had purchased; but that he could not do so without payment to the defendant of his proportionate share of the debts of *A*, which were paid off from the proceeds of the auction-sale of the 21st March 1878. *Jafri Begam* v. *Amir Muhammad Khan* (1) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *Amiruddin* and Shaikh *Maula Bakhsh*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Jogindro Nath Chaudhri*, for the respondent.

OLDFIELD and MAHMOOD, JJ.—The property to which this litigation relates formed part of the estate of one Ahmaduddin, who died in September, 1871, leaving heirs whose names appear in the following table:—



Under the Muhammadan law of inheritance, the estate of the deceased, being divided into 32 *sehams*, devolved upon the heirs in the following proportions:—

Mumtazunnissa	...	...	16	*sehams.*
Jeoni Begam	...	...	4	„
Shahabuddin	...	...	8	„
Imtiazunnissa	...	...	4	„

But it appears that, on account of an alleged will executed by the deceased in favour of his daughter Mumtazunnissa, her name alone was entered with reference to the property, and she alone obtained possession of her father's estate, to the exclusion of his other heirs. The deceased and his brother Shahabuddin appear to have been indebted to the defendant under a hypothecation-bond dated the 8th May, 1867, and subsequent to his death he instituted a suit against Mumtazunnissa alone as representing Ahmaduddin,

(1) Weekly Notes, 1885, p. 248.

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and against the heirs of Shahabuddin. The suit was decreed on the 20th December, 1876, for recovery of the money by enforcement of lien; and, in execution of that decree, the property in suit, along with the shares of other parties—defendants in that suit—was sold by auction on the 21st March, 1878, and purchased by the defendant himself, and under that purchase he is in possession. To none of these proceedings was Jeoni Begam a party, and she died, leaving Ahmad Husain her son and heir, who, on the 19th November, 1882, executed a deed of sale, whereby he conveyed to the present plaintiff the rights and interests in the property inherited by him from his mother, namely, the 4 *sehams* in the estate of Ahmaduddin. This share represents the property in dispute in this litigation. Such being the plaintiff's title, the object of the suit was to recover possession of the share which he had purchased. The defendant, without disputing the question of inheritance and the extent of the rights purchased by the plaintiff, resisted the suit mainly upon the ground that the execution-sale of the 21st March, 1878, having taken place in execution of a decree passed against the estate of the deceased Ahmaduddin for his debts, in a suit to which his daughter Mumtazunnissa, the heir in possession, was a party, the auction-sale at which he purchased conveyed to him absolute ownership of the property, as, under the Muhammadan law, the debts of the deceased ancestor took precedence over the rights of the heirs, and inheritance did not therefore open up in favour of Jeoni Begam till the payment of the debts of the deceased,—the payment of such debts being a condition precedent to the devolution of property upon the heirs.

Both the lower Courts have concurred in accepting this defence and in dismissing the suit, and the plaintiff has appealed upon the ground that, as representing the interests of Jeoni Begam, he was not bound by the decree of the 20th December, 1876, to which she was no party: that Mumtazunnissa could not in that litigation represent so much of the estate of Ahmaduddin as had devolved upon Jeoni Begam, and therefore all that the plaintiff purchased in the auction-sale of the 21st March, 1878, was the rights and interests of those who were parties to the decree, without affecting the rights which the plaintiff had purchased from the son and heirs of Jeoni Begam.

We are of opinion that this contention has force. The question of law involved in this case arose in the case of *Jafri Begam* v. *Amir Muhammad Khan* (1), which was referred to the Full Bench, and the answers given by the whole Court in that case dispose of the contentions of the parties in this litigation. Following the ruling in that case, we hold that, immediately upon the death of Ahmaduddin, the share of his estate claimed in this suit devolved upon his sister Jeoni Begam; that, she being no party to the decree of the 20th December, 1876, her share in the property could not be affected by that decree, nor by the auction-sale of the 21st March, 1878, which took place in execution of that decree; that upon her death that share devolved upon her son Ahmad Husain, who conveyed his rights to the present plaintiff under the sale-deed of the 9th November, 1882, which, upon the findings of the lower Courts, was a *bonâ fide* transaction. The plaintiff is therefore entitled to recover possession of the share which he has purchased; but, according to the Full Bench ruling to which we have already referred, he cannot do so without payment to the defendant of his proportionate share of the debts of Ahmaduddin, which were paid off from the proceeds of the auction-sale of the 21st March, 1878. But no decree giving effect to this view can be framed here without ascertaining—(1) What was the amount for which Ahmaduddin would have been liable under the bond of the 18th May, 1867, at the date of the auction-sale of the 21st March 1878? (2) How much of the proceeds of that sale went to pay off Ahmaduddin's debt? (3) What is the exact amount which the plaintiff, according to the view above expressed, is bound to pay the defendant before obtaining possession of the share claimed by him in the estate of Ahmaduddin?

We remand the case under s. 566 of the Civil Procedure Code for clear findings upon these issues, and ten days will be allowed to the parties for objections under s. 567 of the Civil Procedure Code.

Issues remitted.

(1) Weekly Notes, 1885, p. 243.

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Before Mr. Justice Oldfield and Mr. Justice Mahmood.

JAI RAM (DEFENDANT) *v.* MAHABIR RAI (PLAINTIFF) RAGHUNANDAN RAI AND OTHERS (PLAINTIFFS) PARMANAND RAI AND ANOTHER (PLAINTIFFS) RAGHUNANDAN RAI AND OTHERS (PLAINTIFFS).*

MAHABIR RAI (PLAINTIFF) *v.* RAGHUNANDAN RAI AND OTHERS (DEFENDANTS).*

MAHABIR RAI (DEFENDANT) *v.* RAGHUNANDAN RAI AND OTHERS (PLAINTIFFS).*

RAGHUNANDAN RAI AND OTHERS (DEFENDANTS) *v.* MAHABIR RAI AND OTHERS (PLAINTIFFS).*

RAGHUNANDAN RAI AND OTHERS (PLAINTIFFS) *v.* MAHABIR RAI AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Partition of mahal—Mode of division of property where there are several pre-emptors equally entitled.

The *wajib-ul-arz*, framed in 1856, of a village consisting of several pattis or thokes, gave a right of pre-emption to the owners of each thoke in respect of property situate in every other thoke, when such property was sold to any one having no share in the village co-parcenery. The mahal subsequently became the subject of perfect partition under the N.-W. P. Land Revenue Act (XIX of 1873), and one of the pattis was constituted a separate mahal, and a new *wajib-ul-arz* was framed for it. Prior to the partition, a proprietor of land both in the pattis which remained in the original mahal, and in the patti which formed the new mahal, sold property in both to a stranger. Thereupon a co-sharer in the original mahal brought a suit for pre-emption in respect of the property situate therein which had been sold, excluding the property situate in the new mahal.

Held that the effect of the partition was to exclude property situate in the new mahal from the operation of the *wajib-ul-arz* framed in 1856, and to place it under new conditions as to the right of pre-emption; that the plaintiff could, after the separation, exercise no such right against and in respect of shareholders and property so separated, nor could the separate shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated; and that the suit to pre-empt that portion only of the property sold which was situate in the original mahal was maintainable. *Durga Prasad* v. *Munsi* (1), *Hulasi* v. *Sheo Prasad* (2), *Kashi Nath* v. *Mukhta Prasad* (3), *Motee Sah* v. *Musammat Goklee* (4), *Ram Prasad* v. *Buljeet Singh* (5), *Oomur Khan* v. *Moorad Khan* (6), and *Salig Ram* v. *Debi Prasad* (7), referred to.

Per MAHMOOD J.—The rule of the Muhammadan Law that where more persons than one owning the property in virtue of which the pre-emptive right exists

Second Appeals Nos. 496, 497, 498, 525, 526, 635, and 636 of 1884 from a decree of J. W. Power, Esq., District Judge of Ghâzipur, dated the 15th December, 1883, modifying a decree of Hakim Shah Rahat Ali, Additional Subordinate Judge of Ghâzipur, dated the 31st March, 1883.

(1) I. L. R., 6 All. 423.
(2) I. L. R., 6 All. 455.
(3) I. L. R., 6 All. 370.
(4) N.-W. P. S. D. A. Rep., 1861, p. 506.
(5) N.-W. P. H. C. Rep., 1867, p. 252.
(6) N.-W. P. S. D. A. Rep., 1865, p. 173.
(7) N.-W. P. H. C. Rep., 1875, p. 38.

appear for the purpose of suing, their rights are to be taken as equal *per capita*, with reference to the number of pre-emptors, and not with reference to the number of the shares of each pre-emptor in such property, is so consistent with justice, equity and good conscience, that it must be followed in cases of rival suits for pre-emption under the *wajib-ul arz*, where there is nothing to show that the rival pre-emptors are not equally entitled.

THE facts of these cases are sufficiently stated for the purposes of this report in the judgment of MAHMOOD, J.

Mr. T. *Conlan* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants in Nos. 496 and 499.

The *Senior Government Pleader* (Lala *Juala Prasad*) for the appellants in Nos. 497 and 498.

Munshi *Kashi Prasad*, for the respondent in No. 496.

Mr. *G. E. A. Ross*, Mr. *W. M. Colvin*, Munshi *Hanuman Prasad*, and Munshi *Sukh Ram*, for the respondents in No. 497.

Mr. *G. E. A. Ross* and Munshi *Sukh Ram*, for the respondents in No. 498.

Mr. *W. M. Colvin*, and Munshi *Hanuman Prasad*, for the respondents in No. 499,

Munshi *Kashi Prasad*, for the appellant.

Mr. *G. E. A. Ross*, Mr. *W. M. Colvin*, Munshi *Hanuman Prasad*, Munshi *Sukh Ram*, and Lala *Lalta Prasad*, for the respondents in No. 525,

Munshi *Kashi Prasad*, for the appellant.

Mr. *G. E. A. Ross*, Mr. *W. M Colvin*, Munshi *Hanuman Prasad*, and Munshi *Sukh Ram*, for the respondents in No. 526,

Mr. *W. M. Colvin*, and Munshi *Hanuman Prasad*, for the appellants.

Lala *Lalta Prasad*, and Munshi *Kashi Prasad*, for the respondents in Nos. 635 and 636.

MAHMOOD, J.—The facts of this case and of the connected cases, so far as they are necessary for the purposes of disposing of them, are as follows:—Harbans Lal and Rajkali Kuar, by a deed of sale dated the 27th October, 1881, sold their rights and interests in certain properties to Jai Ram Ojha (defendant) in lieu of a price purporting to be Rs. 24,000. One of these pro-

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perties is situate in patti Thakur Das, one in patti Akbar Husain, one in patti Ram Ghulam, and the fourth is a cultivatory holding to which no right of pre-emption applies. On the 5th October, 1882, Raghunandan Rai, Bhajna Rai, and Jageshar Das, instituted a suit against the vendee and the two vendors for enforcement of the right of pre-emption in respect of the sale of the rights in patti Akbar Khan and patti Ram Ghulam only, asserting that their right of pre-emption did not extend to the other properties included in the sale.

This suit was numbered 195 by the Court of first instance.

A similar suit was instituted by another co-sharer, Mahabir Rai, for pre-empting the same property as that included in the former suit, on the 14th March, 1882, and the suit was numbered 201 by the Court of first instance On the same day, two other co sharers, Parmanand Rai and Sheotahal Rai, applied to be made plaintiffs in suit No. 195, and their application having been granted, their names were entered upon the record as plaintiffs Nos. 4 and 5 respectively. On the 16th December, 1882, the Court of first instance added the name of Mahabir Rai (plaintiff in suit No. 201) as defendant to the first suit No. 195, and similarly added the names of all the five plaintiffs-pre-emptors as defendants to suit No. 201.

The two suits were tried together, and the Court decreed suit No. 195 to the extent of three-fourths of the property in suit, conditional upon payment of a proportionate amount of the purchase-money, and dismissed the suit as to the remaining one-fourth of the property, to which it held Mahabir Rai (defendant in that suit and plaintiff-pre-emptor in suit No. 201) to be entitled. The decree was made subject to the further condition that in case the plaintiffs-pre-emptors in suit No. 195 omitted to execute their decree in the time fixed by the decree, the defendant-pre-emptor Mahabir Rai was to be entitled, upon deposit of the purchase-money, to obtain possession by pre-emption of the three-fourths share decreed to the plaintiffs in that suit. A similar decree was passed by the Court in Mahabir Rai's suit No. 201, decreeing his claim to the extent of one-fourth of the property in suit on payment of a proportionate amount of the purchase-money, subject to

the condition that, upon his failure to make the deposit within time, the defendants, who were plaintiffs-pre-emptors in suit No. 195, would be entitled, upon deposit, to obtain possession by pre-emption of the one-fourth share decreed to Mahabir Rai, plaintiff-pre-emptor in suit No. 201.

Both these decrees are based upon the grounds contained in the judgment passed in Mahabir Rai's suit No. 201; and it appears from the judgment that the reason why the Court allowed the claim in suit No. 195 only to the extent of three-fourths of the property was, that Parmanand and Sheotahal not having joined as original plaintiffs in that suit, their action in subsequently joining the suit was interpreted by the Court to be *malâ fide*, and prompted by a desire to reduce the pre-emptive share of Mahabir Rai (plaintiff in suit No. 201), and on this ground the Court did not take their existence as plaintiffs in the suit into account in apportioning the amount of property to be decreed in that suit.

From these two decrees, all parties appealed to the District Judge.

Jai Ram Ojha preferred appeal No. 33 from the decree in suit No. 195, and appeal No. 34 in suit No 201, the scope of the appeals covering the whole ground included in the two suits. Both these appeals were, however, dismissed by the Judge, the plaintiffs-pre-emptors in both the suits being held entitled to pre-emption against Jai Ram Ojha, defendant-vendee. Raghunandan, Bhajna, and Jageshar also preferred appeals (appeals Nos. 37 and 38) from both the decrees; and similarly their follow-pre-emptors, Parmanand and Sheotahal, who had joined the three persons above-named as plaintiffs to suit No. 195, and were impleaded as defendants to suit No 201, appealed from both the decrees (appeals Nos. 39 and 40). Mahabir, plaintiff-pre-emptor in suit No. 201 also appealed from the decree in that suit, and thus these various appeals (Nos. 37, 38, 39, 36, and 40), related to the contention between the rival pre-emptors in the two suits Nos. 195 and 201. All these appeals were disposed of by the District Judge in his judgment in appeal No. 40, whereby he modified the decrees in both the suits by allowing to each pre-emptor a share in the property in suit in proportion to the extent of such pre-emptor's share in the village, by virtue whereof he had the right of pre-emption,

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rendering such modified decree subject to the payment of a proportionate amount of the purchase-money by each pre-emptor.

From the decrees of the District Judge, Jai Ram Ojha, defendant-vendee has preferred second appeals Nos. 496, 497, 498, and 499, and the pre-emptors have preferred second appeals Nos. 525, 526, 635, and 636. All these appeals were heard together, and the questions raised by them cover the whole scope of the decrees in the two original suits Nos. 195 and 201. With reference to the various contentions raised in this appeal, it will be convenient to deal with them in the same judgment; but the questions raised by Jai Ram Ojha's four appeals (Nos. 496, 497, 498 and 499) must be disposed of first, because if his contention prevails, the effect would be the dismissal of both the original suits, rendering it unnecessary to dispose of the contentions raised by the contending pre-emptors *inter se* in the other four appeals. It appears that the village wherein the property in suit is situate, originally constituted one mahal, governed by the terms of a *wajib-ul-arz* framed on the 26th July, 1856, and to which all the co-sharers in the village were parties. The mahal consisted of various pattis or *thokes*, and the seventh clause of the *wajib-ul-arz* distinctly gave the right of pre-emption to the owners of each *thoke* in respect of property situate in every other *thoke* when such property was sold to a "stranger," that is, a person having no share in the village co-parcenery. Subsequently, about the year 1878, the mahal appears to have been the subject of a "perfect partition," as defined in s. 107 of the Land Revenue Act (XIX of 1873), and patti Thakur Das (in which a portion of the property sold under the sale-deed of the 27th October, 1881, is situate) was constituted a separate mahal, and a new *wajib-ul-arz* was framed for the new mahal on the 30th January, 1879, which also contains a pre-emptive clause in favour of the co-sharers of the new mahal *inter se*. Both the suits with which we have to deal in these appeals were brought, however, for pre-emption on the basis of the *wajib-ul-arz* of 1856, and it has been necessary to mention these circumstances in order to render intelligible the first and second grounds of Jai Ram's four appeals, wherein he contends that, notwithstanding the partition of the original mahal and the constitution of Thakur Das's patti into a new mahal, the plaintiffs in both the suits were entitled to pre-empt,

not only the property situate in the remnant of the old mahal, but also that situate in the new mahal, and that the property situate in both mahals having been conveyed to him by one and the same deed of sale, the plaintiffs could not break up the sale by pre-empting only a portion of the subject of the sale. This plea appears to be based upon the rule explained by me in *Durga Prasad* v. *Munsi* (1), and again in *Hulasi* v. *Sheo Prasad* (2), which followed the view of law taken in *Kashi Nath* v. *Mukhta Prasad* (3) and in older cases. There can be no doubt that every suit for pre-emption must necessarily include the whole of the property, subject to the plaintiff's right of pre-emption, conveyed by one bargain of sale to one stranger, and that a suit which does not include within its scope the whole of such pre-emptional property, is not maintainable, because it is inconsistent with the very nature and essence of the right of pre-emption itself. But before this rule can be applied to the two suits which we are now considering in these appeals, it is necessary to determine whether the plaintiffs in these two suits had any right of pre-emption in respect of so much of the property conveyed by the sale-deed of the 27th October, 1881, as is included in Thakur Das patti which constitutes the new mahal. And in order to determine this point, it is necessary to decide the question what was the effect of the perfect partition of the mahal in 1878-79, which resulted in the new *wajib-ul-arz* of the 30th January, 1879, which, whilst providing in itself a right of pre-emption, governs only the new mahal, namely, that which constituted patti Thakur Das in the original mahal. Bearing in mind the provisions of the law as contained in ss. 111 and 112 of the Land Revenue Act, and other sections of the same enactment relating to the subject, and considering also the fact that there is nothing in the present cases to prove that the perfect partition of the mahal and the constitution of patti Thakur Das into a new mahal was effected irrespective of the wishes or consent either of the defendants-vendors or the plaintiffs-pre-emptors, I hold that the effect of the partition was to exclude patti Thakur Das from the operation of the terms of the *wajib-ul-arz* of 1856, and that the new *wajib-ul-arz* of 1879 created rights of pre-emption among the co-sharers of the new mahal *inter se*, irrespec-

(1) I. L. R., 6 All 423. (2) I. L. R., 6 All. 455.
(3) I. L. R., 6 All. 370.

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tive of the provisions of the *wajib-ul-arz* of 1856. The plaintiffs, therefore, in the present two suits, had no right of pre-emption in respect of the property included in the new mahal, because the custom of pre-emption recognized, *consensu omnium*, in the *wajib-ul-arz* of 1856 could, as a matter of principle, be naturally varied by the perfect partition of 1878-79, which resulted in the new *wajib-ul-arz* of 30th January, 1879 —the separation of Thakur Das patti and the constitution of it into a separate mahal having the effect of separating it from the conditions of tenure which governed the old coparcenery, and of placing it under new conditions as to the right of pre-emption. This view is consistent with the *ratio decidendi* on which a portion of the judgment of the late Sudder Dewany Adawlat in *Motee Sah* v. *Musammat Goklee* (1) and of this Court in *Ram Prasad* v. *Buljeet Singh* (2) proceeded. In the former of these cases the learned Judges observed that "an essential condition of the existence of a right of pre-emption is, that the parties claiming such a right shall be coparceners in the same estate as those against whom the claim is made—a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." The scope of these two suits was therefore co-extensive with the pre-emptive right of the plaintiffs, and the suits were maintainable. This view is supported by the ruling of the Sudder Dewany Adawlat in *Oomur Khan* v. *Moorad Khan* (3), which, although a case governed by Muhammadan Law, laid down the rule which must by equitable analogy be applied to the present case. Indeed the *ratio decidendi* adopted by a Full Bench of this Court in *Salig Ram* v. *Debi Prasad* (4), proceeds upon the same principle, and the right of pre-emption in that case arose out of the terms of the *wajib-ul-arz*.

The second ground of appeal urged on behalf of Jai Ram relates to the question whether the entry in the *wajib-ul-arz* of 1856, regarding the existence of the custom of pre-emption in the village, is correct, and the third ground relates to the proportionate amounts payable by the pre-emptors as price of the shares in res-

(1) N.-W. P. S. D. A. Rep., 1861, p. 506.
(2) N.-W. P. H. C. Rep., 1867, p. 252.
(3) N.-W. P. S. D. A. Rep., 1865, p. 173.
(4) N.-W. P. H. C. Rep., 1875, p. 38.

pect of which their suits have been allowed. Both these pleas raise questions of fact which have already been determined by the lower Courts, and which cannot be considered in second appeal. I may, however, add with reference to the effect of the pre-emptive clause in the *wajib-ul-arz* of 1856, that the argument of the learned pleader for the appellant regarding the status of such entries is materially refuted by the reasons upon which the ruling of the Full Bench of this Court in *Isri Singh* v. *Ganga* (1) proceeded. The effect of this view will be that the four appeals of Jai Ram (S. A. Nos. 496, 497, 498, 499) will be dismissed. I now proceed to consider the remaining four appeals (S. A. Nos. 525, 526, 635, 636), which have been preferred by the various pre-emptors. The grounds of appeal in S. A. Nos. 525 and 526 are identical, and similarly the pleas in S. A. Nos. 635 and 636 are the same. Reading all these grounds of appeal together, they raise only three main questions for determination :—

(1) Whether the right of pre-emption possessed by Mahabir (plaintiff-pre-emptor in suit No. 201) is inferior to that of the plaintiffs in the rival suit No. 195.

(2) Whether Mahabir instituted his suit No. 201 in collusion with the vendee, and whether Parmanand and Sheotahal joined as plaintiffs in suit No. 195 by reason of collusion with the original three plaintiffs, and with the object of reducing the pre-emptive share of Mahabir.

(3) Whether the apportionment of the pre-emptive shares of the various pre-emptors should be apportioned in the two rival suits according to the extent of the shares possessed by each in the village, or *per capita*, that is, equally among all the pre-emptors.

A fourth point is raised in S. A. No. 635 and No. 636, relative to the amount of the purchase-money found by the lower Courts; but as the question relates only to the merits, it cannot be considered in second appeal.

Upon the first point I am of opinion that there is no evidence, and there has been no finding upon the record, to show that Mahabir, plaintiff pre-emptor in case No. 201, is either inferior or

(1) I. L. R., 2 All. 876.

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superior to the rival pre-emptors in the other suits ; and therefore the rights of all co-sharers who have appealed as pre-emptors should be taken as being equal, and should not be estimated in proportion to the shares possessed by the pre-emptors in the village. In all questions of pre-emption there are three important points for consideration :—The first is the property which, by analogy, may be called the dominant tenement, that is to say, the property in virtue of which the pre-emptor's right exists. The second is the pre-emptors themselves. The third is the pre-emptioned property, which may, by analogy, be described as the servient tenement. It is a well-known rûle of the Muhammadan Law as to pre-emption, that where more persons than one owning the pre-emptive tenement appear for the purpose of suing, their rights are to be taken as equal *per capita*, with reference to the number of the pre-emptors, and not with reference to the number of the shares of each pre-emptor in the pre-emptive tenement. The question then is, whether this rule of Muhammadan Law applies to the present case, which is one of pre-emption under the *wajib-ul-arz*. I am of opinion that the rule of Muhammadan Law is so consistent with justice, equity, and good conscience, that it must be followed in cases like the present The reason upon which the law of pre-emption is framed is, that the intrusion of a stranger is disagreeable to the owners of the pre-emptioned property. This disagreeableness is not to be estimated in reference to the share in the property possessed by each pre-emptor, but in reference to each pre-emptor personally, and I hold that the equitable rule is to apportion the rights of the pre-emptors *per capita*. The decision of the District Judge upon this point is therefore overruled.

The second question is, whether the suit of Mahabir, on the one hand, and the application of Parmanand and Sheotahal on the other, were suggested by collusion with the vendee or the pre-emptors in suit No. 195. There is no evidence and no finding to this effect; and even if such collusion existed, it is necessary, in framing a decree in such pre-emptive suits, to obviate the effects of any such collusion. This point, therefore, I regard as unimportant. There is one more point raised in S. A. Nos. 635 and 636, namely, as to the amount of the purchase-money found by the lower Courts to have been paid This, however, is a question as to the merits which

cannot be considered in second appeal. I would therefore pass the following order in these cases:—Following the *ratio decidendi* adopted in *Mahabir Parshad* v. *Debi Dial* (1) and in *Kashi Nath* v. *Mukhta Prasad* (2), I would partially allow appeals Nos. 525, 526, 635, and 636, and set aside the decrees of both the lower Courts in both suits, and in substitution thereof order and decree that in suit No. 195 the plaintiffs-pre-emptors, Raghunandan, Bhajna Rai, Jageshar Das, Parmanand Rai, and Sheotahal Rai, do jointly obtain proprietary possession of five-sixths of the property in suit on payment into Court of a proportionate amount of the purchase-money found by the lower Courts, on or before the 31st May, 1885; that, on such payment being duly made, they do recover from all the defendants five-sixths of the costs incurred by them in all the Courts, but that in default of such payment the suit do stand dismissed with costs in all Courts: provided always that if the defendant Mahabir does not on or before the day above-mentioned duly deposit into Court one-sixth of the purchase-money above-mentioned in enforcement of his decree in suit No. 201, the plaintiff shall be entitled to obtain proprietary possession of the remaining one-sixth of the property in suit on payment of the proportionate amount of purchase-money into Court on or before the 15th June, 1885, and then the whole suit will stand decreed with costs in all the Courts; but that in default of either of the two payments aforesaid being duly made by the plaintiffs, the whole suit will stand dismissed with costs in all the Courts.

And for the same reasons a similar decree, *mutatis mutandis*, will be substituted for the decree in suit No. 201, namely, that in suit No. 201 the plaintiff-pre-emptor Mahabir do obtain proprietary possession of one-sixth of the property in suit on payment into Court of a proportionate amount of the purchase-money found by the lower Courts, on or before the 31st May, 1885, that on such payment being duly made, he do recover from all the defendants one-sixth of the costs incurred by him in all the Courts, but that in default of such payment, the suit do stand dismissed with costs in all the Courts: provided always that if the defendants, Raghunandan Rai, Bhajna Rai, Jageshar Das, Parmanand Rai, and Sheotahal Rai do not, on or before the day above-

(1) I. L. R., 1 All. 291. (2) I. L. R., 6 All. 370.

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mentioned, duly deposit into Court five-sixths of the purchase-money above-mentioned in enforcement of their decree in suit No. 195, the plaintiffs shall be entitled to obtain proprietary possession of the remaining five-sixths of the property in suit on payment of the proportionate amount of the purchase-money into Court on or before the 15th June, 1885, and then the whole suit will stand decreed with costs in all the Courts; but that in default of either of the two payments aforesaid being duly made by the plaintiffs, the whole suit will stand dismissed with costs in all the Courts.

OLDFIELD, J.—The mauza consisted of two mahals; one of the latter held twelve pattis, and one of these, Thakur Das patti, was divided and constituted into a separate mahal. The *wajib-ul-arz* for the mahal, as the mahal originally was constituted prior to partition of patti Thakur Das, contained a condition for pre-emption in favour of the shareholders of the mahal, that the right accrued first to the shares in the thoke in which the property sold was situated, and then to shareholders in other thokes. It appears that Harbans Rai, vendor, who holds property both in the pattis which remain with the original mahal and in the patti of Thakur Das forming the new mahal, has sold property in both to Jai Ram, a stranger; and the plaintiff, who is a sharer in a patti in the original mahal, sues for pre-emption in respect of the property in it which has been sold, excluding that sold in the new mahal Thakur Das's patti, which he does not claim. The claim has been decreed, and the vendee in appeal contends that the plantiff cannot pre-empt a portion of the property sold to the exclusion of the property in mahal Thakur Das. The contention is not valid. The condition as to pre-emption only affected the shareholders of the mahal as long as they remained shareholders, and ceased to have effect upon those shareholders and their property who separated themselves and their property by forming a separate mahal. The plaintiff could after the separation exercise no right of pre-emption against and in respect of shareholders and property as so separated, nor could the separated shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated. The next plea refers to the method by which the consideration payable by the pre-emptor has been determined, but on this point the judgment

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does not appear open to objection. The appeal fails and is dismissed. This decision affects appeals Nos. 497, 498, and 499. The decree in the suit will be in the terms proposed by my learned colleague.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885 *March* 30.

RAI BALKISHEN (DECREE-HOLDER) *v.* RAI SITA RAM AND ANOTHER (JUDGMENT-DEBTOR). *

Execution of decree—Joint ancestral property—Execution against deceased son's interest in hands of the father—Death of judgment-debtor after attachment and before sale—Charge in favour of decree-holder—Civil Procedure Code, s. 274—Copy of order for attachment not fixed up in Collector's office.

In execution of a money-decree, an order was issued under s. 274 of the Civil Procedure Code, for the attachment of property which was the joint ancestral estate of the judgment-debtor and his father. A copy of this order was not fixed up in the office of the Collector of the district in which the land was situate, as required by s. 274. The sale was ordered and a day fixed for sale, but in consequence of postponements made at the judgment-debtor's request, no sale took place. In the meantime the judgment-debtor died, and the decree-holder applied for execution against the father as representative of the judgment-debtor, whose interest had survived to him.

Held that the decree-holder had, by the proceedings taken in execution during the son's lifetime, obtained rights over his interest which could not be defeated by his death before sale. *Suraj Bansi Koer* v. *Sheo Persad Singh* (1) followed.

Held also that, though the defect in the manner in which the attachment was made might render the attachment ineffectual for the purpose of voiding alienations made, the attachment was effectual against the judgment-debtor, and the defect did not afford a ground for declaring the execution proceedings ineffectual.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Mr. *T. Conlan* and Pandit *Bishambar Nath*, for the appellant.

Mr. *W. M. Colvin*, Mr. *N. L. Paliologus*, Pandit *Nand Lal* and Munshi *Kashi Prasad*, for the respondents.

OLDFIELD, J.—The appellant, Rai Balkishen, held a money-decree against Lachmi Chand, son of the respondent Rai Sita Ram. He took out execution in Lachmi Chand's lifetime against him for attachment and sale of a revenue-paying estate, which

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* First Appeal No 118 of 1884, from an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 17th May, 1884.

(1) I. L. R., 5 Calc. 148 ; L. R, 6 Ind. Ap 108.

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was the joint ancestral property of father and son. An order for attachment under s. 274, Civil Procedure Code, was issued by the Court, but there was this defect in the manner in which the attachment was made, that the copy of the order was not fixed up in the office of the Collector of the district in which the land was situate, as required by s. 274. The sale was ordered, a day was fixed for sale, but in consequence of adjournments made at the request of Lachmi Chand, no sale took place. In the meantime Lachmi Chand, the judgment-debtor, died on the 16th April, 1881, and on the 24th February, 1883, the decree-holder applied for execution against Rai Sita Ram as the representative of the judgment-debtor, as survivor of the judgment-debtor's family, the interest of the son having survived to him. The execution has been disallowed, and the decree-holder appeals. The question raised is whether the interest which the son had in the joint ancestral property, can be reached by the decree-holder in the hands of the father, and it is a question which seems covered by the authority of the Privy Council ruling in *Suraj Bansi Koer* v. *Sheo Persad Singh* (1). The decree-holder holds only a money decree against Lachmi Chand, and his interest could not be reached by the decree-holder in the hands of the debtor's father, to whom his son's interest has survived ; but the question is, whether the proceedings taken in execution in the son's lifetime constitute a valid charge on the property which cannot be defeated by his death. In the case of *Suraj Bansi Koer* it was held that when property has been attached and proceedings towards sale have been taken in the lifetime of the judgment-debtor by the creditor, a valid charge is created in favour of the creditor, which will not be defeated by the death of the judgment-debtor before sale. I think such has been the case here. An attachment of the judgment-debtor's interest was made by order under s. 274, Civil Procedure Code, prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise, and the order was proclaimed as required in the second paragraph of the section. This attachment was acted on and accepted by the judgment-debtors as a valid attachment, and the sale was ordered, and

(1) I. L. R., 5 Calc. 148, L. R., 6 Ind. Ap 108.

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would have taken place in the judgment-debtor's lifetime but for postponements made at his request, when, also at his request, the attachment continued in force.

I consider that the creditors had by these proceedings obtained rights over the judgment-debtor's interest which cannot be defeated by his death, and that the defect in the manner in which the attachment was made—the copy of the order not having been fixed up in the office of the Collector of the district in which the land is situate—will not make any difference. The defect might render the attachment ineffectual for the purpose of voiding alienations made, but the property was attached, and the attachment was expressly continued in force at the request of the judgment-debtor, who obtained repeated postponements of the sale; it was effectual against him, and the respondent cannot take hold of this defect so as to have the execution proceedings declared ineffectual.

I would decree the appeal, and set aside the order refusing execution, and remand the case for disposal. Costs to be costs in the cause.

MAHMOOD, J.—I concur.

Cause remanded.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1885 *March* 30.

SITA RAM (OBJECTOR) *v.* BHAGWAN DAS (DECREE-HOLDER).*

Civil Procedure Code, s. 244—Question for Court executing decree—Party to suit—Representative.

Where, certain property having been attached in execution of a decree, the representative of the judgment-debtor objected that the property had been acquired by himself and not inherited from the judgment-debtor, and was therefore not liable in execution,—*held* that the question was one which must be decided in the execution department under s 244 of the Civil Procedure Code. *Ram Ghulam* v. *Hazaru Koer* (1) referred to

THE facts of this case are sufficiently stated in the judgment of Oldfield, J.

Mr. *W. M. Colvin*, Mr. *N. L. Paliologus*, Lala *Jokhu Lal*, Pandit *Nand Lal*, and Munshi *Kashi Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

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* First Appeal No. 128 of 1884, from an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 17th May, 1885.

(1) *Ante*, p. 547.

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OLDFIELD, J.—The question raised is, whether certain property which the decree-holder has attached in execution of a decree against Lachmi Chand, is liable to be attached and sold under the decree; the appellant, who is the representative of the judgment-debtor, having objected that the property was the self acquired property of himself, and not property inherited from the judgment-debtor, and therefore not liable in execution. This is a question which must be decided in the execution department under s. 244, Civil Procedure Code—*Ram Ghulam* v. *Hazaru Koer* (1) may be referred to—and the Court was in error to refuse to entertain and dispose of the objection. This order is set aside, and the case will be remanded for disposal. Costs to be costs in the cause.

MAHMOOD, J.—I concur.

Cause remanded.

1885 *March* 30.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

RAMESHAR SINGH (JUDGMENT-DEBTOR) *v.* BISHESHAR SINGH (DECREE-HOLDER). *

Abatement of appeal—Application for declaration of insolvency—Appeal from order rejecting application—Death of decree-holder-respondent—No application by appellant for substitution—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 171 *B.—Civil Procedure Code, ss.* 344-348, 350, 351, 368, 553, 582, 590.

The decree-holder respondent in an appeal from an order refusing an application by the judgment-debtor for declaration of insolvency under s. 344 of the Civil Procedure Code, died, and the judgment debtor appellant took no steps to have the legal representative of the deceased substituted as respondent in his place.

Held that art. 171 B, sch. ii, of the Limitation Act (XV of 1877) applied to the case, and that, as no one had been brought on the record to represent the deceased respondent within the period prescribed, the appeal must abate.

Per MAHMOOD, J., that, whatever the position of the parties might have been in the regular suit, in the insolvency proceedings the judgment-debtor occupied a position analogous to that of a plaintiff, and the decree-holder occupied the position of a defendant.

Narain Das v. *Lajja Ram* (2), distinguished.

THIS was an appeal from an order of the District Judge of Benares, dated the 17th May, 1884, refusing an application under s. 344 of the Civil Procedure Code, for declaration of insolvency.

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* First Appeal No. 87 of 1884, from an order of D. M. Gardener, Esq., District Judge of Benares, dated the 17th May, 1884.

(1) *Ante*, p. 547. (2) *Ante* p. 693.

The respondent having died, the appellant was allowed time to take proper steps in the matter, but he took no steps. The son of the deceased respondent subsequently applied to be substituted, and an order was made substituting him. At the hearing of the appeal it was contended for the respondent that the appeal should abate.

Munshi *Hanuman Prasad*, for the appellant.

Munshi *Kashi Prasad*, for the legal representative of the deceased respondent.

MAHMOOD, J.—In my opinion this appeal must abate. The decree-holder-respondent, Bisheshar Singh, is stated by the learned pleaders for the parties to have died on the 4th September, 1884, and no application for the substitution of his legal representatives has been made by the appellant, nor is there anything stated on his behalf as a sufficient cause for not making the application. Pershid Narain, the son of the deceased respondent, has, however, applied to be substituted as the legal representative of the deceased, and, by an order of the 26th March, 1885, his name has been substituted. The learned pleader who appears for him, however, argues that, the application not having been made within the time provided by art. 171B of sch. ii of the Limitation Act (XV of 1877), we are bound by law to order that the appeal shall abate. For this contention the learned pleader relies on the last part of s 368 of the Civil Procedure Code (read with ss 647, 582, and 590), and s. 4 of the Limitation Act. On the other hand, the learned pleader for the appellant, whilst conceding that the period provided by art. 171 B, sch ii of the Limitation Act, has expired, contends, with reference to the recent Full Bench ruling of this Court in *Narain Das* v. *Lajja Ram* (1) that the appellant should be regarded as a "*defendant*," and that his appeal must therefore be held to be absolutely free from liability to abatement, whether he impleaded any one as representative of the deceased respondent or not, and the only effect of his omission to implead the respondent's heir should be, to allow the appeal, and to set aside the order of which the appellant complains, or, failing this, to dispose of this appeal on the merits.

(1) *Ante*, p. 693.

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I confess that I cannot understand the Full Bench ruling of the majority of the Court to have any other effect ; but the ruling is not, in my opinion, applicable to the present case.

Whatever the position of the parties may have been in the regular suit, the judgment-debtor-appellant in the insolvency proceedings, under Chapter XX of the Civil Procedure Code, occupied a position analogous to that of a plaintiff.

S. 344 of the Civil Procedure Code allows the judgment-debtor, who may, of course, have been either plaintiff or defendant in the regular suit, to make an application for declaration of insolvency ; s. 345 states the contents which must form the application, and, among these, clause (*f*) relates to the creditors who would be affected by such declaration of insolvency ; s. 346 lays down that " the application shall be signed and verified by the applicant in manner hereinbefore prescribed for signing and verifying plaints ;" and ss. 347 and 348 provide that a copy of the application and notice must be served upon creditors, &c., who occupy a position analogous to that of defendants. S. 350 provides for a hearing of the case in the presence of the contending parties, and s. 351 lays down rules for adjudication either in favour of the applicant or the opposing parties.

Reading these provisions of the law together, I am of opinion that the position of an applicant for a declaration of insolvency is sufficiently analogous to that of a plaintiff in a regular suit. I arrive at this conclusion, especially, not only because the applicant is the person who moves the Court and prays the Court to grant him a specific remedy, *viz.*, an adjudication of insolvency, but also because, referring to ss. 344, 345, and 346, and reading them with s. 553 of the Code, the provisions which apply to plaintiffs-appellants also apply to the judgment-debtor-appellant in these proceedings.

Whatever the position of a judgment-debtor may be in the regular suit, in the insolvency proceedings he is the plaintiff. The Court which had jurisdiction to decide the regular suit, had not necessarily jurisdiction to decide the application for insolvency, because s. 349 lays down that such application should be made to the Dis-

trict Court, which is the highest Court having jurisdiction to decide ordinary original civil cases.

It has been argued that the position of the judgment-debtor-appellant is not absolutely analogous to that of the plaintiff in a regular suit; in the first place, because he (the judgment-debtor) would be defendant in the regular suit; and, in the next place, the rules applicable to the plaintiff in the regular suit did not apply to him, because his complaint, petition or prayer did not involve the array of creditors as defendants, nor could the creditors be in any sense regarded as "*defendants*" to such a proceeding.

The argument is plausible, but has no real force.

No doubt, in an insolvency proceeding, the Court has not to deal with the claim of *A* against *B* as specific parties, but has to deal with the petitioner's prayer for declaration of insolvency as against such creditors as may appear to oppose the application as against the whole world. S. 41 of the Evidence Act deals with the effect of such adjudications. Judgments passed by the Court in such proceedings would be judgments *in rem*, binding not only upon the specific defendants, but upon the whole world. So far as the question of array of parties is concerned, the parties arrayed against the petitioner (who claims to be declared insolvent) are the creditors who would appear on the issue of the citation or who are named by the applicant. The position of the appellant being that of a plaintiff, the position of the decree-holder is that of the defendant, and, as a matter of fact, in this case the appellant did implead the decree-holder in his petition. The decree-holder-respondent having died, it was the appellant's duty to have some representative of the respondent substituted for him.

In this view, s. 368 is applicable to the present case, because, though relating to suits, it has been made applicable to miscellaneous proceedings by s. 647, and also to appeals from orders by s. 590 of the Civil Procedure Code. It was the duty of the appellant to apply within the time prescribed by law, under art. 171B, sch. ii of the Limitation Act.

This article is somewhat curiously worded, in that it only mentions the defendant. By the rule of interpretation contained in the second paragraph of s. 3 of the Code, art. 171B of the Limi-

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tation Act must be construed with reference to s. 368 of the present Civil Procedure Code. Reading s. 368 with s. 582 of the Code, it is clear that the word *defendant* in s. 368 includes a *respondent*, and art. 171B of the Limitation Act is applicable to the case of a defendant, and it follows that that article applies to the present case.

No application having been made within the time allowed by art. 171B, the appeal must abate under the last clause of s. 368, read with ss. 582 and 590 of the Civil Procedure Code, with costs.

OLDFIELD, J.—I concur, although with some hesitation, in holding that this appeal must abate, as no one has been brought on the record to represent the deceased respondent within the term of limitation. Dismissed with costs.

Appeal dismissed.

1885 *April* 1.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

RAM PRASAD AND OTHERS (DEFENDANTS) *v* RAGHUNANDAN PRASAD (PLAINTIFF.)*

Act I of 1872 (*Evidence Act*), *ss* 63 (*c*), 114, *illustration* (*g*)—*Secondary evidence—Copy of a copy—Suit for redemption of mortgage—Burden of proof—Withholding evidence.*

A deed executed in 1812 became the subject of litigation resulting, on the 17th May 1813, in a decree the effect of which was to create a usufructuary mortgage of rights and interests in two villages In 1871, the purchaser of a portion of the mortgagor's rights, alleging that the mortgage-debt had been liquidated from the usufruct, sued to recover possession of the property. The mortgagees resisted the claim for possession, on the grounds that, prior to the execution of the deed in 1812, the mortgagor's ancestor had granted to their own ancestor a *gawanda-dari* right, under which a fixed *jama* of Rs. 121 was payable by them in respect of the lands in the village, that what was mortgaged was not the lands, but only the right to receive the fixed *jama*, and that the fact that the mortgage money had been liquidated from the *jama* did not entitle the plaintiff to oust them from possession. It appeared that the alleged *gawanda-pattar*, the original mortgage deed, and the decree of the 17th May 1813, were at one time in the defendants' possession, but the defendants alleged that all three documents were destroyed by fire in 1872. The plaintiff sought to support his case by putting in a copy on plain paper purporting to have been transcribed from a certified copy of the decree of the 17th May 1813.

Held, with reference to the provisions of s. 63 of the Evidence Act (I of 1872), that, there being no evidence proving that the copy produced by the plaintiff had been compared with the original decree, the copy was not admissible in

* First Appeal No. 18 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Ghazipur, dated the 22nd December 1882.

evidence, inasmuch as it could not be regarded either as primary or as secondary evidence of the contents of the original decree.

Held also, that the destruction or loss of the three documents alleged by the defendants to have been destroyed not being proved, their non-production placed them under the recognized prohibitions of the law of evidence, and subjected them to the presumption recognized by illustration (*g*), s. 114 of the Evidence Act, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

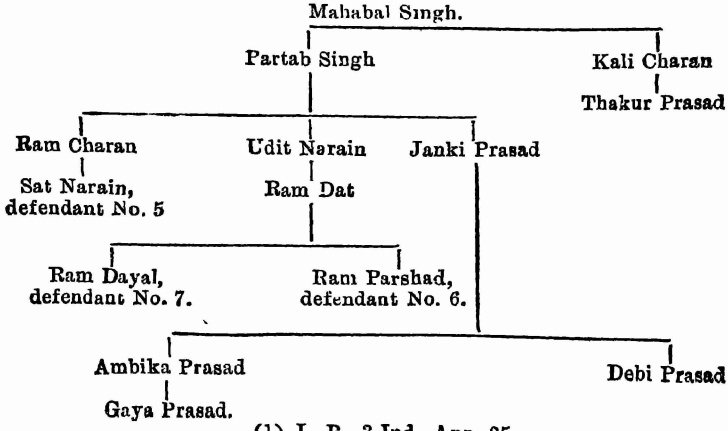
Held also, that inasmuch as the plaintiff was no party to the alleged *gawanda-pattar*, nor to the mortgage of 1812, nor to the litigation which resulted in the decree of the 17th May 1813, and could not therefore be taken to be in a position to produce these documents or to prove their contents by secondary evidence; and inasmuch as the circumstances established a *prima facie* case in his favour, the burden of proof in regard to the existence of the alleged *gawanda dari* tenure lay upon the defendants, who, whilst in a position which would involve their being in possession of the documents above-mentioned, and whilst admitting such possession up to the year 1872, had failed to prove either their destruction or their contents by secondary evidence such as could be relied on. *Rajah Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Mahmood, J.

Mr. *T. Conlan* and Mr. *G. T. Spankie*, for the appellants.

Mr. *W. M. Colvin*, Mr. *G. E. A. Ross*, and Munshi *Hanuman Prasad*, for the respondent.

MAHMOOD, J.—The facts of the case, as far as they are necessary for the disposal of this appeal, may be recapitulated here, and the following pedigree throws light upon them :—



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In each of the two villages Mangalpur and Saidpur, Mahabal Singh owned an eight annas share, known as Patti Mahabal Singh. It is admitted in this case that, on or about the 4th April, 1812, Mahabal Singh executed a deed which became the subject of litigation. resulting in a decree dated the 17th May, 1813, the effect of which was to create a usufructuary mortgage of the rights and interests of Mahabal Singh in the two villages above-named, in lieu of a sum which is stated by the defendants to have amounted to Rs. 4,684. Another fact admitted in the case is, that under the terms of the mortgage so created the mortgage would expire in 1278 fasli, 1871 *A. D.*, the usufruct of the interval of fifty-eight years being regarded as liquidating the mortgage without the necessity of taking any accounts at the time of redemption.

Upon the death of Mahabal Singh, his rights and interests devolved in equal shares upon his two sons Kali Charan and Partab Singh, and their rights having been at various times sold, under circumstances stated in paragraph 4 of the plaint, the plaintiff has acquired a six annas eight pies share in mauza Mangalpur, and a two annas eight pies share in mauza Saidpur, and his name has been recorded in the Government revenue papers as proprietor of these shares. The rest of the mortgagor's rights in these properties belong to the persons who have been impleaded in this suit as *pro formâ* defendants.

Upon this state of things, the plaintiff instituted this suit, praying for possession of the entire eight annas share in Mangalpur and the entire eight annas share in Saidpur, on the ground that he was entitled to such a remedy by virtue of being a joint holder of the equity of redemption in the mortgaged property. The plaint set forth that, under the terms of the mortgage, the money due thereon was liquidated from the usufruct by the very fact of the lapse of the term of the mortgage. The plaint also prays for recovery of mesne profits.

The principal defendants, who occupy the position of mortgagees, resisted the suit upon the ground that, before the mortgage by Mahabal Singh, his ancestor, Babu Abhai Singh, had granted a *gawanda-dari* right to their ancestors, that under that settlement a fixed *jama* of Rs. 121 was payable by them "with respect to all

the zamindari dues, cultivatory lands, *sayer*, uplands and low-lands, water and forest produce, ponds, tanks, fruitful and unfruitful trees, of an eight annas share in each of the villages Mangalpur and Saidpur." They further pleaded that under the terms of the mortgage, what was mortgaged was not the lands of these villages, but only the right of Mahabal Singh to receive the fixed *jama* of Rs. 121, and that the condition in the mortgage was "that the sum of Rs 71 out of Rs. 121, the amount of *jama* fixed as the right of of Mahabal Singh, should be annually set off against the principal mortgage-money, and Rs. 50, the Government revenue, should be paid to the proprietor; and that, after the expiration of 1278 fasli, Rs. 121 should be paid to the proprietor of the property as before." Upon this ground, the defendants contended that "the fact that the mortgage-money has been liquidated from the *jama* fixed does not entitle the plaintiff to effect redemption of the mortgage by removal of the defendants' possession." They further went on to say that "the deed *gawanda-pattar* granted by Mahabal Singh's ancestor to the ancestor of the defendants before the British reign, was kept in a bundle of papers in the defendant Ram Prasad's house, which was destroyed by fire, and the file and bundle of papers were also burnt along with all the goods kept in the house." It may be noted here that the fire to which this allegation relates is stated in the evidence to have occurred about the year 1872.

The only other pleas in defence which need be noticed here are, that the plaintiff as owner only of a portion of the property is not entitled to claim possession of the entire property in the suit; and the other plea, after questioning the amount of mesne profits claimed by the plaintiff, goes on to say that "the entire amount of the profits of mauza Saidpur and Mangalpur comes to Rs. 242, half of which, Rs. 121, is paid to the proprietors of Patti Mahabal Singh, that the plaintiff himself has refused to take the amount which he is entitled to, according to proportion, on account of the share purchased by him."

Among the *pro formâ* defendants, Sat Narain (defendant No. 5), Ram Parsan (defendant No. 6), and Ram Dayal (defendant No. 7), defended the suit upon allegations supporting the case set up by the principal defendants; whilst Ram Khilawan (defendant No. 8)

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raised the plea that he was improperly impleaded in the suit, and the remaining defendant (No. 4), Nand Kumar Singh, did not appear to defend the suit at all.

The lower Court held that the defendants had failed to prove their allegation that they held any *gawanda-dari* right in the property; that the plaintiff had succeeded in proving that the mortgage of 1812-13 did not relate only to the *malikana* right as stated by the defendants, but to the full proprietary right in the lands of the villages which represented the share of Mahabal Singh; that the mortgage having been liquidated by the lapse of the year 1278 fasli, the plaintiff was entitled to proprietary possession by redemption of the share belonging to him, together with mesne profits of such share; that he was also entitled to obtain possession as mortgagee of the shares of Ram Khilawan and Nand Kumar who had not resisted the suit, but that he was not entitled to claim possession of the shares of Sat Narain, Ram Parsan, and Ram Dayal, who had contested the plaintiffs by supporting the case set up by the principal defendants-mortgagees. To the extent of the shares of the last named three persons, the suit was therefore dismissed, and the question of determining the amount of mesne profits was left by the Court for decision in execution of the decree.

From the decree so passed by the lower Court, only the principal defendants-mortgagees have preferred this appeal, and the argument of the learned counsel for the appellants raises only one main question for determination, namely, whether the defendants-appellants possessed any *gowanda-dari* rights in these villages at the time of the mortgage; in other words, did Mahabal Singh under that mortgage place them in possession of the village lands, &c., or only mortgage his right to receive the fixed *jama* of Rs. 121 under the conditions stated by the defendants? There is therefore only one issue for determination in this appeal, and its decision relates only to the weight of evidence in the case, and raises no main question of law.

Before proceeding further, I wish to decide a question upon which much argument has been addressed to us on either side. One of the most important pieces of evidence produced by the plaintiff to support his case was a copy on plain paper, purporting

to have been transcribed from a certified copy of the decree of the 17th May, 1813. The document was admitted by the lower Court in evidence on the ground that, the original decree having been destroyed, the plaintiff had made fruitless attempts to obtain a certified copy, that the defendants were in all probability in possession of a certified copy of the decree, but did not produce it as it would not support their case. The learned counsel for the appellants contended that the copy was produced under suspicious circumstances and could not be relied upon, whilst Mr. Colvin on behalf of the respondent supported the admissibility of the document upon the ground that the evidence upon the record proved that the copy produced in evidence was transcribed from a certified copy, and could therefore be regarded as secondary evidence of the contents of the original decree. I am of opinion that the argument urged on behalf of the appellant on this point has force. Whatever the law may have been upon the subject before the passing of the Indian Evidence Act (I of 1872), the rules contained in that enactment must now be strictly observed. S. 61 of the Act lays down that "the contents of documents may be proved either by primary or by secondary evidence," and I understand the rule to mean that there is no other method allowed by law for proving the contents of documents. S. 62 defines the meaning of primary evidence; s. 63 describes what constitutes secondary evidence within the meaning of the Act; and cl. (*c*) of the section lays down in express language that "a copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but a copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original." There is no evidence in this case, even if the whole deposition of the plaintiff's witness Anup Narain be accepted, which proves that the copy of the decree now produced in evidence was compared with the original decree, and I therefore hold that it was not admissible in evidence, because it could not be regarded either as primary or secondary evidence of the contents of the original decree. The contents of the copy must therefore be kept out of mind in determining this appeal.

The question then is, on whom lay the burden of proof in this case in regard to the existence of the *gawanda-dari* tenure alleged

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by the defendants-appellants ? But before determining this question, especially with reference to the expression as used in evidence, it seems to me necessary to ascertain the exact nature of the tenure known as *gawanda* in the district in which the property in suit is situate. In the *North-Western Provinces Gazetteer*, vol. XIII, p 63, under the heading of cultivatory tenures, the following account is given of *gawanda-dari* :—" A tenure peculiar to the eastern portion of the district is the *ganwadh* (of uncertain derivation—a corruption, perhaps, of *ganw-wara*). The normal form of this tenure is the grant at a fixed rent of a whole village, or definite tract within a village, to a community of Brahmans. Where this can be inferred to have existed at the permanent settlement, the tenure is proprietary ; in other cases, the precise definition and legal quality are rather doubtful *Ganwadhs* may originate by grant as above mentioned, by purchase, or even by mere usurpation on the part of the village headmen In the last case it is confused with, and generally indistinguishable from, the *tika istimrari* or ' perpetual lease,' another not unfrequent tenure in which a whole village or definite part of it is leased to the *mukaddam* or headman at a fixed rent. In the case of *ganwadhas* and *tikas*, the *status* of the under-tenants that pay rent to the *ganwadhars* and *tikadars* is somewhat obscure, and has to be determined, when dispute arises, by the investigation of each particular instance For it may happen that the under-tenant is a mere tenant-at-will, incapable by law of acquiring occupancy-right by lapse of time, or he may be a fixed rate tenant whose holding dates before the *ganwadh* or *tika*, or may have acquired occupancy-right under a *ganwadhar* whose own tenure is recognised as proprietary." The tenure thus described seems to have existed in *Sheopertab Narain Singh* v. *Hurshunker Pershad Singh* (1), as well as in *Likhun Pathuk* v *Roop Lal* (2), in both of which cases the nature of the tenure was referred to In the present case, however, the nature of the *gawanda-dari* right claimed by the defendants-appellants is specifically described by themselves in para. 3 of their written statement ; they admit distinctly that the full proprietorship of the villages, including the right to actual possession of the lands, &c., did at one time vest in Babu Abhai Singh, ancestor of Mahabal Singh, and that the *gawanda-dari*

(1) N.-W. P. H C. Rep., 1873, p. 40 (2) N.-W. P. H. C Rep., 1871, p. 48.

tenure was created by the former by grant of a deed of *gawanda-pattar* to the defendant's ancestors, and that the *gawanda-pattar* was in their possession up to the year 1872, when a fire in the defendant Ram Prasad's house destroyed the document. The original mortgage-deed and the decree of the 17th May, 1813, would have been equally important pieces of documentary evidence in the present case, and it was alleged that they were in possession of the defendants-appellants, who, without denying that the documents were at one time in their possession, stated (in para 5 of their written statement) that they were burnt along with the *gawanda-dari pattar* in the fire to which reference has already been made. Under these circumstances, the occurrence of the fire and the burning of the bundle of papers said to have contained these three important documents, constitute an important subsidiary point for arriving at any conclusion upon the merits of the case. The evidence upon the point, however, is either hearsay or unsatisfactory. There may possibly have been a fire in the defendant Ram Prasad's house, but it is certainly not proved that the *gawanda-pattar*, the mortgage-deed, or the decree of the 17th May, 1813, were burnt in that fire. On the other hand, the application made by the defendants, dated 7th July, 1868 (paper No. 174 on the record), in a former litigation contains such specific reference to the decree that I agree with the learned Subordinate Judge in holding that it must at that time have been in their possession. The destruction or loss of these three important documents not having been proved, their non-production by the defendants places them under the recognized prohibitions of the law of evidence, and subjects them to the presumption recognized by illustration (*g*), s. 114 of the Evidence Act, "that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it." It appears from an attested copy (paper No. 135 on the record) that the plaintiff's ancestor made an application on the 13th August, 1872, to the proper authorities for obtaining a duly attested copy of the decree of the 17th May, 1813, but the application could not be granted, because the original decree no longer existed among the official records. It is clear that, neither the plaintiff nor his ancestor having been a party to the litigation of 1813, they could not be expected to have obtained a certified

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copy of the decree, and it is equally clear that under the circumstances of the case the non-production by the defendants of the alleged *gawanda-dari pattar*, and of the mortgage-deed, and the decree, leaves the plaintiff in a more or less helpless position in contesting the case set up by the defendants as to their *gawanda-dari* right. The case therefore upon this point falls within the purview of the rule laid down by the Lords of the Privy Council in *Rajah Kishen Dutt Ram Pandey* v. *Narendar Bahadoor Singh* (1), which was a suit for redemption, and in which, the mortgage-deed not being forthcoming, there was a contention between the mortgagor and the mortgagee as to the exact terms of the mortgage. Their Lordships observed: —"It appears to their Lordships that in such a case as the present it lies upon the plaintiff to substantiate his case by some evidence—by some *primâ facie* evidence at least. But in this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence, and although' the burden of proof *primâ facie* in this case, in their Lordships view, is upon the plaintiffs, still they think the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be, *primâ facie* at all events, more in his power to give accurate evidence of its contents. ..... . The plaintiff, by the hypothesis, would not have seen the document, or probably have had access to it from the time of its execution, which in this case was the year 1840; whereas the defendant would be assumed to have it and to be able to produce it, to show why he could not, and to give some evidence of its contents if it were lost."

I have quoted these observations at such length because they seem to me to be especially applicable to the circumstances of the present case, which indeed in some points furnishes even stronger grounds for applying the rule than the case before their Lordships of the Privy Council. Here the plaintiff, who is simply a purchaser of a portion of the right of Mahabal Singh, was no party to the alleged *gawanda pattar*; he was no party to the mortgage of 1812, nor to the litigation which resulted in the

(1) L. R. 3 Ind App. 85.

decree of the 17th May, 1813. He cannot, therefore, be taken to be in a position to produce those documents or to prove their contents by secondary evidence. The defendants, on the other hand, whilst in a position which would involve their being in possession of the documents, and whilst admitting that they were in possession of them up to the year 1872, have failed to prove either their destruction or their contents by secondary evidence, such as can be relied upon. The plaintiff, on the other hand, has, in my opinion, shown a very good *primâ facie* case which the defendants have not been able to rebut.

This leads me to the consideration of the various points in the evidence; but before doing so I wish to notice an argument which has been addressed to us with especial cogency by Mr. Colvin on behalf of the plaintiff-respondent. The main feature of the defendant's case is, that the mortgage of 1812-13 was executed in lieu of a sum amounting to no less than Rs. 4,684; that it was a *patwari* mortgage for a definite term of fifty-eight years; that is, the mortgage would, by the very lapse of its term, be liquidated from the usufruct of the mortgaged property, or rather from the fixed annual *malikana jama* of Rs. 121, which the defendants represent to have been the limit of the rights of Mahabal Singh which he gave in mortgage as security for repayment of the debt. Further, the defendants' case is, that out of this sum of Rs. 121, Rs. 50 were to go towards payment of the Government revenue and only Rs. 71 were to be appropriated by the defendants-mortgagees towards payment of principal and interest due on the mortgage. Now, Mr. Colvin has effectively shown that such a hypothesis is rebutted by purely arithmetical calculation. It must be remembered that, according to the defendants' case, not the zamindari rights in the lands, &c., of the village, but only the fixed sum of Rs. 71, the annual *malikana jama*, was given as the sole security for repayment of the mortgage-debt. Now this annual sum of Rs. 71, if multiplied into fifty-eight, which is the number of years constituting the term of the *patwari* mortgage, would yield only a sum of Rs. 4,118, which falls short even of the alleged principal sum of the mortgage by no less than Rs. 566. A mortgage of such a nature is not intelligible in the ordinary course of human affairs, and the result of Mr. Colvin's argument by

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arithmetical calculation shows the absurdity of the defendants' case, in proportion to the rate of interest which may be assumed as having been agreed upon between the mortgagor and the mortgagee. The rate of interest, if assumed at 12 per cent. per annum, would yield more than Rs. 500 per annum, and even if 6 per cent. per annum is assumed to be the rate, the annual interest alone would be more than Rs. 250 per annum. This circumstance alone seems to me to raise a strong presumption in favour of the plaintiff's allegation that the mortgage by Mahabal was a mortgage not of his alleged *malikana jama*, which, according to the defendants' case, was a fixed sum under the *gawanda pattar*, incapable of increase, but the subject of the mortgage was the zamindari rights in the lands of the village, which might well, by increase of cultivated area or otherwise, have been regarded as likely to yield sufficient usufruct to satisfy not only the principal, but also the interest due on the mortgage. It may here be added in connection with this point that the defendants in this very case pleaded that the profits of the mortgaged property were less than those stated by the plaintiff.

In the face of such circumstances, which establish a strong *primâ facie* case in favour of the plaintiff-respondent, it was incumbent upon the defendants-appellants to have produced the strongest possible evidence to substantiate their case. They failed, as I have already said, to produce the best documentary evidence which would conclude in their favour the point in contention between the parties. And with the presumptions against them, which their course of action in the suit involves, I have to consider whether the evidence produced by them substantiates their case. (The learned Judge then proceeded to consider this evidence, and, being of opinion that it did not substantiate the defendants' case, came to the conclusion that the appeal should be dismissed.)

BRODHURST, J.—I concur with my learned colleague. The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1885
April 11.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

QUEEN-EMPRESS v. LALLI.

Act XLV of 1860 *(Penal Code), s.* 201.

In a trial upon a charge under s. 201 of the Penal Code, the accused made a statement to the effect that he was present at the commission of a murder by two other persons, that he himself took no part in the act, that before the murder was committed, one of the persons named pulled off a *razai* from the bed on which the deceased was sleeping, and that, in his presence, the *razai* was subsequently concealed in a stack. It was proved that the *razai* belonged to the deceased, that it was found concealed in a stack, and that it was pointed out by the accused to the police The accused was convicted of concealing evidence of the murder, with the intention of screening the offender from legal punishment, under s. 201 of the Penal Code.

Held that the conviction must be quashed, inasmuch as if the *razai* had not been concealed or destroyed, its presence or existence would have been no evidence of the murder.

A person who is concerned as a principal in the commission of a crime cannot be convicted of the secondary offence of concealing evidence of the crime.

THIS was an appeal from a conviction by Mr. H. A. Harrison, Sessions Judge of Meerut, dated the 17th February, 1885. The appellant was charged before the Court of Session with offences under ss. 201 and 202 of the Penal Code, and was convicted under the former section. The facts of this case are stated in the judgment of the Sessions Judge, which was as follows:—

"Salik, the brother of Dalli, was in his field when he was murdered. His brother Dalli found his corpse in the morning. The neck was between a wooden pitchfork: there were wounds on the head. The medical evidence shows that the skull was extensively fractured. The left jaw and eye were also injured. There were also abrasions on the nose and linear contusion on the neck, the latter caused evidently by the pitchfork.

"It appears that, at first, suspicion attached to no one; afterwards the accused was suspected, because the deceased had on two or three occasions found fault with him for joking with his sister-in-law, the wife of his brother Dalli."

"The evidence of Dalli shows that the deceased had with him a *razai*. The recovery of this *razai* is the principal evidence in this case. The accused made two statements—one on the 20th

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November, before Umrao Singh, Honorary Magistrate, and a second one before the committing Magistrate.

"His statements were—that Ganga Sahai and deceased were at feud, the former having been fined on the complaint of deceased; that while he (accused) was sleeping at Ram Dayal Bania's, he was awakened by Mari and Mathura, nephew and son of Ganga Sahai, and asked by them to come with them and inspect the fields; that he went, and after Mathura and Mari had inspected their own fields, they went to the field of the deceased, where deceased was sleeping on a bed; that Mathura asked him (accused) to pull the *razai* off deceased, which he refused to do; that Mari pulled the *razai* off and asked him to stand aside; that he did so, when Mathura and Mari killed Salik with a *darati*; that they then left Mathura, carrying the *razai* which he had taken from deceased; that he (accused) went to sleep, and the others went to their home; that next evening Mathura asked him to come with him to conceal the *razai*; that Mari joined them, and that they all three went to Ram Ratan's field, where Mathura put the *razai* into a stack of *jawar*; that he (accused) was to keep silence; that when the darogah came he first denied all knowledge of the murder, and afterwards told him what had occurred, and pointed out the *razai*. Before this Court the accused pleaded not guilty, but when asked if the two statements made before the Magistrate were his, and were true, he stated that they were, and it was not till after the assessors had given their opinion in writing after the judgment had commenced, that accused retracted his statement, saying it was made under compulsion.

"The fact that the accused pointed out the *razai*, which was well concealed in a *jawar* stack, is proved by the evidence of two witnesses. The fact that the *razai* belonged to Salik is fully established.

"There can be no doubt that the statements made by the accused were voluntarily made. The second was made thirteen days after the first: they are lengthy, with much detail in them, and in this Court the accused admitted that they were true.

"That the statements are wholly true, no one can for a moment believe. There can be but little doubt that the accused was

the actual murderer, but there is no evidence to convict him upon, except his own statement and the recovery of the *razai*. In his statements he does not admit that he had any hand in the murder. He denies knowing that any murder was contemplated; all that he does admit is, that the murder and concealing of the *razai* took place before him; that he knew not that any murder was intended, but that he did know that the *razai* was to be concealed. His statements that Mathura and Mari killed deceased are doubtless false; but at the same time the probability is, that more than one were engaged in the murder. The reason assigned for the murder by accused seems to the Court altogether insufficient; others no doubt were engaged in it: who they were, and by what motive actuated, is not known.

"In the face of the double statements of the accused, and the admission in this Court that those statements were true, the Court must find the accused guilty of the charge under s. 201, for by his own admission he formed one of the party who went expressly to conceal the *razai*, and the evidence proves that he himself pointed out where it was.

"The assessors find the accused guilty of the charge under s. 201. The second charge is included in the first; for if a man conceals evidence, he does not report the crime which he tries to conceal.

"The Court finds that Lalli is guilty of the charge—that he, knowing an offence punishable with death had been committed, concealed a *razai* taken from the murdered person, that evidence of the commission of the offence might disappear, with the intention of screening the offender from legal punishment, and has thereby committed an offence punishable under s. 201, Indian Penal Code."

The appellant was not represented.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

PETHERAM, C. J., and BRODHURST, J.—In our opinion this conviction must be quashed on the ground that s. 201, Indian Penal Code, contemplates concealment or destruction of evidence

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of a crime. In this case, if the *razai* had not been concealed or destroyed, its presence or existence would have been no evidence of the murder. Again, in our opinion, on the construction of the section, the person who is concerned as a principal cannot be convicted of the secondary offence of concealing evidence of the crime. The conviction must be quashed and the prisoner released.

Conviction quashed.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrell.

KASHI PRASAD AND ANOTHER (DECREE-HOLDERS) *v.* MILLER (JUDGMENT-DEBTOR).*

Execution of decree—Attachment of property—Judgment-debtor declared an insolvent—Claim by official assignee to attached property—Appeal from order disallowing claim—Statute 11 & 12 *Vic., c.* 21, *ss* 7, 49—*Civil Procedure Code, ss.* 244, 278—" *Representative* " *of judgment debtor.*

A decree-holder, having attached the property of his judgment debtors in execution of the decree, obtained an order for sale of the attached property. Prior to sale, the judgment debtors made an application to be declared insolvents, and obtained an order under Stat. 11 and 12 Vic, c. 21, s. 7, by which their property was vested in the Official Assignee. An application was then made by the Official Assignee to the Court in which the execution of the decree was pending, for the release of the property from attachment, and that the property might be made over to him. The Court dismissed the application. On appeal, the District Judge reversed the first Court's order.

Held that the matter did not come before the Court of first instance under s. 49 of Stat. 11 and 12 Vic., c. 21, inasmuch as that section refers to cases where the insolvent's schedule has been filed, and to debts or demands admitted therein and, in the present case, no schedule had been filed at the time of the Official Assignee's application ; and the Court could therefore only entertain the application under the provisions of the Civil Procedure Code relating to the execution of decrees.

Held that the Official Assignee could not be held to be a representative of the judgment-debtors within the meaning of s 244 of the Civil Procedure Code, and his application was not one relating to the execution, discharge, or satisfaction of the decree.

Held that the Court of first instance had only jurisdiction in the matter under s. 278 of the Code, and disposed of it under that section, and that the District Judge had no jurisdiction to entertain the appeal.

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* Second Appeal No. 69 of 1884, from an order of A. Sells, Esq., District Judge of Cawnpore, dated the 10th March, 1884, reversing an order of Maulvi Farid-ud-din, Ahmad, Subordinate Judge of Cawnpore dated the 6th September, 1883.

(1) I. L. R, 7, Calc. 213.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *Greenway* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent

OLDFIELD and TYRRELL, JJ.—It appears that the firm of Gaya Prasad and Kashi Prasad, represented by appellant, obtained a decree against Chota Lal and Sheo Prasad for money due, on the 31st March, 1883. They had, on the 2nd March, 1883, attached property of the judgment-debtors before judgment, and the attachment continued in force after decree, and they took out execution, and on the 4th April, 1883, obtained an order for the sale of the attached property.

The judgment-debtors, prior to sale, applied on the 11th April, 1883, in the Calcutta High Court, to be declared insolvents, and on the 11th April, 1883, the High Court made an order under Stat. 11 and 12 Vic., c. 21, s. 7, vesting their property in the Official Assignee, who is the respondent before us.

On the 2nd June, 1883, the Official Assignee made an application in the Court of the Subordinate Judge of Cawnpore, where the execution of the decree was pending, for the release of the property from attachment, and that the property be made over to him. On the 6th September, 1883, the Subordinate Judge dismissed the application, and the Official Assignee appealed to the Judge, who reversed the order and allowed the application. The judgment-creditors now prefer an appeal to this Court from the Judge's order. There are two contentions raised—(1) that no appeal lay in the matter to the Judge; (2) that the judgment-creditor, by reason of having attached the property of his judgment-debtors, and obtained an order for sale before the date of the vesting order, which vested the property in the Official Assignee, obtained rights in the property which cannot be affected by the vesting order. In order to determine the first question, we have to see how the application on the part of the Official Assignee came before the Court executing the decree, and what jurisdiction it had in the matter. The order vesting the real and

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personal estate of the insolvents in the Official Assignee was made under s. 7, Statutes. 11 and 12 Vic., c. 21, and s. 49 enables the Court in which any action, suit, execution or process is pending in respect of a debt or demand contained in an insolvent's schedule, to stay the proceedings or set aside or suspend the execution or process, so far as respects the debt or demand, until further order of the Court which made the vesting order. But the matter did not come before the Subordinate Judge under this section. It refers to cases where the insolvent's schedule has been filed, and to debts or demands admitted in the schedule, and no schedule had been filed at the time of the Official Assignee's application. The Subordinate Judge could therefore only entertain the application under the provisions of the Code of Civil Procedure relating to execution of decrees. S. 244 relates to questions between parties to the suit in which the decree was passed or their representatives relating to the execution of the decree; and s 278 to objections by third parties to attachment of property made in execution of the decree. Now, if the application is to be considered as one to be dealt with, and which was dealt with, under s. 278 and succeeding sections, the order made on it was not appealable to the Judge, and the appellant's contention that the Judge had no jurisdiction is valid. If, on the other hand, the application was one to be dealt with under s. 244, the Subordinate Judge would have jurisdiction, and the appeal was cognizable by the Judge. Did, then, the matter of the application relate to questions between the parties to the suit or their representatives, and in regard to the execution, discharge or satisfaction of the decree? In other words, can the Official Assignee be held to be a representative of the judgment-debtor within the meaning of s. 244, and does his application relate to the execution, discharge or satisfaction of the decree? We do not think this can be held. The Official Assignee did not apply to the Court as one representing the judgment-debtor in regard to any matter relating to the execution, discharge or satisfaction of the decree, but as a third party in whom the insolvent debtor's property had become vested under the Insolvent Debtors Act, and his object was to have the attachment withdrawn and the property made over to him, not for any purpose of execution of the decree, but that he might deal

with it under the provisions of the Act for the benefit of the general body of the creditors. As a matter of fact, he appears to have made his application under s. 278, and it was so treated by the Subordinate Judge. Nor can the Official Assignee be considered to be a representative of the judgment-debtor within the meaning of s. 244. He represents the general body of the creditors for whose benefit the property of the judgment-debtor is vested in him in trust, and it was in this capacity, as representing them and for their benefit, that he made his application.

The Judge has, therefore, erred in regarding the respondent as a representative of the judgment-debtor and treating the matter as one to be dealt with under s. 244, Civil Procedure Code, the order on which was open to appeal ; and we cannot find that he is supported by the case he refers to (1), as there was no ruling in that case to the effect that the Official Assignee can be regarded as a representative of the judgment-debtor, and an application of this nature is one to be dealt with under s. 244, Civil Procedure Code.

We are of opinion, therefore, that the Subordinate Judge had only jurisdiction in the matter under s. 278, and he disposed of the application under that section, and the Judge had no jurisdiction to entertain the appeal. It is not necessary for us to consider the second question raised. We decree the appeal and set aside the Judge's order with costs.

Appeal allowed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1885 *May* 9.

KOLAI RAM AND ANOTHER (PLAINTIFFS) *v.* PALI RAM AND OTHERS (DEFENDANTS)

Amendment of decree—Judgment awarding interest for period prior to suit—Decree directing interest to be paid from date of suit—Civil Procedure Code, ss. 206, 209.

The judgment in an appeal adjudged interest to be paid for the period prior to the institution of the suit only. The decree contained an order for payment of interest from the date of the suit onwards.

Held that no variance with the judgment, within the meaning of s. 206 of the Civil Procedure Code, was involved in the additional order contained in the decree.

(1) *Miller* v. *Mon Mohun Roy* ; I. L. R., 7 Calc. 213.

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v.
PALI RAM.

THIS was an application by the respondents for the amendment of the decree of the High Court in F. A. No. 125 of 1882. The grounds of the application are stated in the judgment of the Court.

Munshi *Hanuman Prasad*, for the respondents, applicants.

Pandit *Ajudhia Nath*, for the appellants, opposite parties.

BRODHURST and TYRRELL, JJ.—We are asked to amend this decree on the ground that it is at variance with the judgment in the appeal, inasmuch as the decree contains an order for the payment of interest from the date of the suit onwards, whereas interest was adjudged by the judgment for the period prior to the institution of the suit only. But no variance with the judgment is involved in this additional order contained in the decree. The decree agrees in all the respects with the judgment, according to the requirements of s. 206 of the Civil Procedure Code. It contains clearly and specifically all the reliefs adjudged by the Court, and the Court is competent under s. 209 to "order" *in its decree* that interest at a reasonable rate should be paid on the principal sum *adjudged* (*scil.* in the judgment) from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with *further* interest at a reasonable rate on the aggregate sum so adjudged from the date of the decree to the date of payment, or such earlier date as the Court thinks fit. The language is similar to that of the Act for the Repeal of the Usury Laws, No. XXVIII of 1855, ss. 2 and 3.

In the case before us, the Court has in its decree done no more than it was competent to do under the powers conferred by this section, and the decree has not thereby been made to be in variance with the judgment passed by the Court.

We therefore disallow this objection with costs.

Application refused.

FULL BENCH.

1885
May 12.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* RAM SARUP AND OTHERS.

Offence made up of several offences—Rioting—Grievous hurt—Criminal Procedure Code, s. 235—*Act XLV of* 1860 (*Penal Code*), *ss.* 146, 147, 149, 325.

Three persons who were convicted (i) of riot under s. 147 of the Penal Code, (ii) of causing grievous hurt in the course of such riot, were respectively sentenced to six months' rigorous imprisonment under s. 147, and three months' rigorous imprisonment under s. 325.

Held by PETHERAM, C. J., and STRAIGHT and TYRRELL, JJ., that inasmuch as the evidence upon the record showed that the three prisoners had committed individual acts of violence with their own hands, which constituted distinct offences of causing grievous hurt or hurt separate from and independent of the offence of riot, which was already completed, and the fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under s. 325 of the Penal Code, the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress* v. *Ram Partab* (1) distinguished.

Per BRODHURST, J., that the evidence showed that only one of the three prisoners had caused grievous hurt with his own hands, and that the others could only be properly convicted of that offence under the provisions of s. 149 of the Penal Code; but that the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress* v. *Dungar Singh* (2) followed.

Also *per* BRODHURST, J.— Illustration (*g*) of s. 235 of the Criminal Procedure Code does not apply merely to the case of persons who, in addition to the offence of rioting, have with their own hands committed the further offences of voluntarily causing grievous hurt, and of assaulting a public servant when engaged in suppressing a riot; and the convictions referred to in the illustration relate especially to convictions obtained under the provisions of s. 149 of the Penal Code.

THIS was a reference to the Full Bench by STRAIGHT, J. The point of law referred and the facts out of which it arose are stated in the referring order, which was as follows:—

STRAIGHT, J.—Ram Sarup and Narain Das were convicted—(i) of riot under s. 147 of the Penal Code; (ii), of causing grievous hurt in the course of such riot to a person of the name of Daya Ram, and they were respectively sentenced to six months' rigorous imprisonment under s. 147, and three months under s. 325. It is objected on their behalf by the petition for revision that these separate sentences were illegal. I think they were, and I have

(1) I. L. R., 6 All. 121. (2) *Ante*, p. 29.

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already stated the views I entertain upon the matter in *Queen-Empress* v. *Ram Partab* (1). My brother Brodhurst, however, has expressed a contrary opinion in *Queen-Empress* v. *Dungar Singh* (2), and as this conflict may lead to confusion in the lower Courts, I refer the question raised in the first ground of the petition for revision to the Full Bench.

Mr. *C. Dillon* and Mr. *N. L. Paliologus*, for the petitioners.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J., and STRAIGHT and TYRRELL, JJ.—We find, upon looking into the evidence in this case, that Ram Sarup, Narain Das, and Mahbub Shah are shown to have committed individual acts of violence with their own hands, which constituted distinct offences of causing grievous hurt or hurt, separate from and independent of the offence of riot, which was already completed. The fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under s. 325 of the Penal Code, and it is in this respect that this case is clearly distinguishable from *Queen-Empress* v. *Ram Partab* (1). In holding that Ram Sarup, Narain Singh, and Mahbub Shah were liable to separate punishments under ss. 325 and 147 of the Penal Code, we in no way disturb that ruling. Let the referring Bench be answered accordingly.

BRODHURST, J.—The question referred to the Full Bench is whether separate sentences, under ss. 147 and 325 of the Indian Penal Code, are illegal.

Mr. Justice Straight, who made the reference, was of opinion that, in the case before him, the separate sentences passed under the two sections above-mentioned were illegal, and he referred the question as different views on the subject had been expressed in two judgments of this Court, one in *Queen-Empress* v. *Ram Partab* (1), and the other in *Qneen-Empress* v. *Dungar Singh* (2), as it was not improbable that these conflicting judgments might lead to confusion in the lower Courts.

The same question was one of four questions referred to the Full Bench by a Division Bench—Mahmood and Duthoit, JJ.—

(1) I. L. R., 6 All. 121. (2) *Ante*, p. 29.

in the case of *Queen-Empress* v. *Pershad* (1). The case was argued on the 17th January last before the Full Bench, which then consisted of five Judges; but unfortunately the majority of the Judges were of opinion that it was unnecessary to consider this particular question.

At the hearing of the present case before the Full Bench, the learned counsel were informed from the Bench that we were unanimously of opinion that the applicants had, under the circumstances of the case, been properly convicted and sentenced, both under ss. 147 and 325 of the Indian Penal Code, and that nothing further would, on this occasion, be decided, and consequently the points of law referred to in the two judgments abovementioned, and regarding which there appeared to be a difference of opinion, were not fully argued.

A judgment has now been written in this case by my brother Straight, and I am informed that our other learned colleagues have concurred in it. I agree in holding that Ram Sarup, Narain Das, and Mahbub Shah, were each liable to separate punishments under ss. 147 and 325 of the Indian Penal Code, but I do so on entirely different grounds to those relied upon by my honourable colleagues.

I also have looked into the evidence, and I find that, only one person, *viz.*, Daya Ram, sustained "grievous hurt," and that injury was caused by one of the bones of his right wrist having been fractured by a "*lathi* blow." It is palpable, therefore, that only one of the accused persons can have caused grievous hurt with his own hands, and that three persons cannot properly be convicted of that offence, except under the provisions of s. 149 of the Indian Penal Code.

There is ample proof that the accused, with others, amounting to some fifty or sixty persons, armed with *lathis*, went to mauza Behri, with the common object that they would by means of criminal force, or show of criminal force to the zamindars of the village, take or obtain possession of a certain share in that village in case the Court Amin was unable to give them possession of that share, that they assembled at the village in spite of the remons-

(1) *Ante*, p. 414.

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trances of the Amin, who apprehended a riot, and that they remained behind when he went away without having been able to give possession to the decree-holder. It is clearly proved that the accused were members of an unlawful assembly, and they each thus became punishable, under s. 143 of the Indian Penal Code, with imprisonment of either description for a term which might extend to six months, or with fine, or with both. They, however, did not stop at the commission of this offence, and as they went on to commit riot, they were properly punished, not for being members of an unlawful assembly, but for the more heinous offence of rioting, which is punishable, under s. 147 of the Indian Penal Code, with imprisonment of either description, for a term which may extend to two years, or with fine, or with both. They became guilty of "rioting" as defined in s. 146 of the Code, in the following manner, *viz.*, that when they were members of an unlawful assembly, one of them, *viz*, Narain Das, in prosecution of the common object of that assembly, struck Sewa Ram, the karinda of the zamindars, on the head with a *lathi*, and voluntarily caused grievous hurt to him; thereupon every member of the unlawful assembly, including the applicants, became guilty of the offence of rioting, and became liable to punishment as above-mentioned. During the riot a second person, *viz.*, Sadanand, also sustained hurt, and a third person, *viz.*, Daya Ram, sustained grievous hurt. Under the provisions of s. 149 of the Indian Penal Code, the accused, who were members of the unlawful assembly, were guilty of "rioting," of "voluntarily causing hurt," and of "voluntarily causing grievous hurt." These three offences were committed in one series of acts so connected as to form the same transaction, and the accused could therefore, under the provisions of s. 235 of the Criminal Procedure Code, be tried at one trial for every one of those offences. They could, as shown in *illustration* (*g*) of s. 235, have been separately charged with and convicted of the three offences above-mentioned, and that persons can under such circumstances, not only be convicted, but can still also be sentenced for each of the three offences, as when Act X of 1872 was in force, is, I think, conclusively shown in the latter of the two judgments referred to at the commencement of these remarks.

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I think it desirable here to observe that I am unable to agree in the opinion expressed by one of my learned colleagues at the hearing of the case, that *illustration* (*g*) of s. 235 of the Criminal Procedure Code applies merely to the case of persons who, in addition to the offence of rioting, have with their own hands committed the further offences of voluntarily causing grievous hurt, and of assaulting a public servant when engaged in suppressing a riot.

Illustrations are furnished from ordinary and not from extraordinary cases, and it is in the highest degree improbable that seven rioters should, each with his own hands, cause grievous hurt, and also assault a public servant engaged in suppressing the riot; but it is not improbable that one of the seven rioters should commit both of the said offences; and there is, I think, no room for doubt that the convictions under ss. 147, 325 and 152 of the Indian Penal Code, referred to in *illustration* (*g*) of s. 235 of the Criminal Procedure Code, relate especially to convictions obtained under the provisions of s. 149 of the Penal Code.

My reply to the reference is, that for the reasons above stated, as well as for the reasons stated in my judgment in *Queen-Empress* v. *Dungar Singh* (1), the separate sentences that were passed under ss. 147 and 325 of the Indian Penal Code, in the case before us, were not illegal.

APPELLATE CIVIL.

1885
May 14.

Before Mr. Justice Straight and Mr Justice Brodhurst.

MUHAMMAD MALIK KHAN (DEFENDANT) *v.* NIRHAI BIBI AND OTHERS (PLAINTIFFS)*.

Suit for profits in respect of several years—Court-fees—Distinct causes of action—Distincts subjects—Act VII of 1870 (*Court-fees Act*), *s.* 17—*Civil Procedure Code, ss.* 43, 44.

In an appeal in a suit for recovery of profits under s. 93 (*h*) of the N.-W. P. Rent Act, in respect of several years, the proper court-fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year.

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* Stamp reference in First Appeal No. 97 of 1885.

(1) *Ante*, p. 29.

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MUHAMMAD MALIK KHAN v. NIRHAI BIBI.

THIS was a case referred to the Court by the Registrar under s. 5 of the Court-fees Act.

The reference was in these terms :—

"The office has laid this memorandum of appeal before me for determination of the question whether the court-fee paid is sufficient. The suit is one for recovery of profits under s. 93 (*h*) of the Rent Act for the years 1286—88 fasli. The plaintiff-appellant has calculated the court-fee on the aggregate amount of the claim, Rs. 9,541, and paid Rs. 455. The fee payable on this basis is Rs 465, and thus in any case there is a deficiency of Rs. 10; but if the proper method of calculation be that the fee should be levied separately on the amount of profits claimed for each year, it would be Rs 205, and Rs. 190, and Rs. 170, that is, Rs. 565, and there is a deficiency of Rs. 110.

The case is on all fours with the case of *Mihip Narain* v. *Jagat Narain* (1) in which Straight, J, directed that the court-fee should be calculated on the latter basis. The reason for that decision was, that it had been held in the cases of *Raja Sutto Churn Ghosal* v. *Obhoy Nand Dass* (2) and *Ram Soondur Sein* v. *Krishno Chunder Goopto* (3) that arrears of rent for successive years are severed and distinct causes of action, in respect of which a plaintiff might institute separate suits, and that therefore, under the construction placed by the Full Bench on s. 17 of the Court-fees Act in *Mul Chand* v. *Shib Charan Lal* (4), such arrears formed "distinct subjects" in the light of that section.

The Calcutta High Court has, however, more recently held that the cases referred to above are overruled by s. 43, Act X of 1877 (now Act XIV of 1882), and that the *illustration* to that section treats a claim to all arrears of rent as a single cause of action—*Taruck Chunder Mukerji* v. *Panchu Mohini Debya* (5). This latter decision is, moreover, in accordance with a decision of the Madras High Court—*Chockalinga Pillai* v. *Kumara Viruthalam* (6). It is evident that in such cases there is but one contract, and although each item as it falls due constitutes a debt which

(1) N.-W. P. Legal Remembrancer, 1880, H. C. Series, p. 124.
(2) 2 W. R., 31.
(3) 17 W. R. 380.
(4) I L. R. 2 All 676.
(5) I. L. R. 6 Calc 791
(6) 4 Mad. H. C. Rep. 334.

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might be sued for when due, the understanding is that, if unsued for, it shall be added to other items due when the suit is brought, and shall form one entire demand, the aggregate constituting but one cause of action. The same principle is not confined to cases where there is one separate contract, but is extended to the case of tradesmen's bills in respect of which there may have been separate contracts, but in which one item is so connected with another that the dealing is intended to be continuous—*Grimbly* v. *Aykroyd* (1). S. 17 of the Court-fees Act was evidently not meant to apply to a case where there are various items based on one agreement, but which are intended to form one entire demand, but rather to cases where there are several and independent claims based on different titles, which, with the leave of the Court under s 44, Civil Procedure Code, have been united in one suit.

I think therefore that the decision in *Mahip Narain* v. *Jagat Narain* (2) should be reconsidered, and refer the case to the Court under s. 5 of the Court-fees Act.

Mr. *Amir-ud-din*, the *Senior Government Pleader* (Lala *Jwala Prasad*), Munshi *Hanuman Prasad*, and Munshi *Sukh Ram*, for the appellants.

STRAIGHT and BRODHURST, JJ.—We are of opinion that the proper fee leviable is the one calculated on the aggregate amount of the profits claimed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr Justice Tyrrell

1885 *May* 15.

DAMODAR DAS (PLAINTIFF) *v* WILAYET HUSAIN (DEFENDANT)*.

Majority—Capacity to contract—Muhammadan over 16 *years of age before Act IX of* 1875 *came into force—Muhammadan Law—Act IX of* 1872 (*Contract Act*), *s* 11—*Act XL of* 1858 (*Bengal Minors Act*) *s* 26—*Act, IX of* 1875 (*Majority Act*), *s.* 2 (*c*).

In a suit upon a bond executed on the 5 h June, 1875, by a Muhammadan who at that date was sixteen years and nine months old, the defendant pleaded that at the time when the bond was executed, he was a minor, and that the agreement was therefore not enforceable as against him.

Held that the defendant, having at the date of the execution of the bond, reached the full age of sixteen years, and so attained majority under the Muham-

* First Appeal No 80 of 1884, from a decree of Muhammad Abdul Qayum Subordinate Judge of Bareilly dated the 10th May, 1884.

(1) 1 Exch. 479.

(2) N.-W. P. Legal Remembrancer, 1880, H. C. Series, p. 124

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madan Law, which, and not the rule contained in s. 26 of the Bengal Minors Act (XL of 1858), was the law applicable to him under s 2 (c) of the Indian Majority Act (IX of 1875) before the latter Act came into force, was competent in respect of age to make a contract in the sense of s 11 of the Contract Act (IX of 1872), and the agreement was therefore enforceable as against him.

The rule contained in s 26 of the Bengal Minors Act is limited by its terms to "the purposes of that Act", which provides exclusively for the care of the persons and property of minors possessed of property which has not been taken under the protection of the Court of Wards; and it is to such persons only, when they have been brought under the operation of the Act as in it provided, that the prolongation of nonage under s. 26 applies.

THIS was a suit for recovery of a sum of money, principal and interest, due upon a bond executed by the defendant in favour of the plaintiff on the 5th June, 1875. The defendant (who was a Muhammadan) pleaded, *inter alia*, that at the date of the execution of the bond he was a minor, and that the agreement was therefore not enforceable as against him. The lower Court found that the defendant at the date of execution was sixteen years and nine months old. Upon this finding, it held that the provisions of Act IX of 1875 (Indian Majority Act) were applicable, that therefore the defendant, having been under eighteen years of age at the time when he executed the bond, was at that time not competent to contract, and that the suit was in consequence not maintainable against him.

The plaintiff appealed to the High Court, contending that "the respondent was not a minor according to the law applicable to him on the date of the execution of the bond in dispute."

On his behalf it was urged that "the law applicable to him" within the meaning of Act IX of 1875, s. 2 (*c*), was the Muhammadan Law, according to which he had attained majority at the age of sixteen years, before that Act came into force. On behalf of the respondent, it was urged that "the law applicable to him" was that contained in Act XL of 1858 (Bengal Minors Act), s. 26.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Bishamber Nath*, for the appellant.

Mr. *C. H. Hill*, for the respondent.

PETHERAM, C.J., and TYRRELL, J.—We are of opinion that the respondent was not a minor in June, 1875, when he executed

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the bond on which this suit has been brought. He had then attained the full age of sixteen years, and had thus reached his majority under the Muhammadan Law, which was applicable to him before Act IX of 1875 came into force. He was consequently competent in respect of age to make a contract in the sense of s. 11 of the Indian Contract Act.

We hold that the "law applicable to" the respondent under s. 2, cl. (*c*) of Act IX of 1875, was the Muhammadan Law, and not the statute law contained in s. 26, Act XL of 1858, because it seems to us that the rule of that section is limited by its terms to "the purposes of that Act," which provides exclusively for the care of the persons and property of one class of minors, that is to say, minors possessed of property which has not been taken under the protection of the Court of Wards. It is to such persons, and to them only, when they have been brought under the operation of the Act, as in it provided, that in our view the prolongation of nonage under s. 26 applies. We have not overlooked the rulings to the contrary effect on this point, in forming the conclusion above stated. We may observe, however, that no ruling has been cited to us in which it has been held in terms that a Muhammadan who had not been made amenable to the provisions of Act XL of 1858 was a minor for the purposes of making a contract till he had reached the age of eighteen years.

We therefore set aside the decree of the Court below, and decree this appeal with costs.

Appeal allowed.

FULL BENCH.

1885
June 4.

Before Sir W. Comer Petheram, Kt, Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

BAL KISHEN (DEFENDANT) *v.* JASODA KUAR (PLAINTIFF)*.

Second appeal—Finding on issue of fact remitted—Civil Procedure Code, ss. 565, 566, 568.

Held by the Full Bench (TYRRELL, J., dissenting), that the findings upon issues remanded by the High Court in second appeal cannot be challenged upon

* Second Appeal No 1731 of 1883, from a decree of A. Sells, Esq, District Judge of Cawnpore, dated the 17th September, 1883, affirming a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 21st December, 1882.

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the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined. *Nivath Singh* v. *Bhikki Singh* (1) referred to.

Per PETHERAM, C. J., and TYRRELL, J., —Ss. 565 and 566 of the Civil Procedure Code are, as far as may be, incorporated in Chapter XLII of the Code relating to second appeals, and when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is the duty of the High Court on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand.

Per STRAIGHT, J.—S. 587 of the Civil Procedure Code does not mean that the provisions of Chapter XLI relating to first appeals are to be applied indiscriminately or in their entirety to second appeals, and implies no warrant for the decision by the High Court of questions of fact in any shape or at any stage of a second appeal. *Ramnarain* v. *Bhawanidin* (2) and *Shevambar Singh* v. *Lallu Singh* (3), referred to.

Per TYRRELL, J.—The jurisdiction of Courts of second appeal in respect of questions of fact is restricted, insomuch as the appeal may not be entertained on "grounds" of fact, but, under the circumstances of s. 566 of the Code, no less than under the abnormal circumstances contemplated by the ruling of the Full Bench in *Nivath Singh* v. *Bhikki Singh* (1), the Court may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. In cases where the Court, still acting under s. 566, has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court,—the term "finding" being used in s. 566 in its restricted sense of an answer to the proposition referred for inquiry, and not of an award or decision of the issue before the Court.

THIS was a reference to the Full Bench by Petheram, C. J., and Brodhurst, J. The point of law referred was as follows :—

"Whether, when a case comes before the Court on second appeal, and an issue of fact has been remitted, the finding on that issue can be challenged upon the evidence as in first appeals."

The second appeal in which this reference was made arose in a suit for possession of certain immoveable property, which the plaintiff alleged had been purchased by her in the name of the defendant. The Court of first instance gave the plaintiff a decree,

(1) *Ante*, p. 649. (2) Weekly Notes, 1882, p. 104.
(3) Weekly Notes, 1882, p. 158.

which, on appeal by the defendant, the lower appellate Court affirmed. On second appeal by the defendant, the High Court (Oldfield and Mahmood, JJ.) being of opinion that the lower appellate Court had lost sight of the real issue in the case, namely, whether the plaintiff had actually found the money by which the estate in dispute had been purchased, remanded this issue to the lower appellate Court for trial. The lower appellate Court decided that the plaintiff had actually found the money by which the estate in dispute had been purchased. On the return of this finding, the defendant took objections to its propriety. The case came before Petheram, C. J., and Brodhurst, J., who referred the question stated above to the Full Bench.

Mr. *C. H. Hill*, for the appellant.

Mr. *Shivanath Sinha*, Pandit *Ajudhia Nath*, and Munshi *Kashi Prasad*, for the respondent.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—This reference raises the question—How far is the decision of the first appellate Court final on questions of fact which have been remanded to it for trial by the High Court on second appeal ?

It has been decided by a Full Bench decision of this Court (1), that it is lawful for the Court on the hearing of a second appeal to look into the evidence for the purpose of ascertaining whether the findings of fact are of such a character as to contravene the rules laid down in that case.

In my opinion, it follows as a necessary consequence from that decision that, as the Court has the power to look into the evidence, it must have the power to remand issues for trial when it appears that the issues necessary for the determination of the dispute have not been tried, *and the evidence necessary for the trial of such issues has not been taken*; and consequently I think that in such a case the provisions of s. 565 are, "as far as may be," incorporated in the chapter relating to second appeals; but inasmuch as the findings on the remanded issues and the evidence upon them are, when returned, part of the record in the second appeal, the findings are, in my opinion, subject to the same incident as the other findings of fact in the case, and can only be disputed on the grounds

(1) *Nuath Singh* v. *Bhikki Singh*, *ante*, p. 649.

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prescribed by the judgment of the Court in the recent Full Bench decision.

It follows from these remarks that, in my opinion, s. 565 and s. 566 are, as far as may be, incorporated in the chapter which relates to second appeals, and that when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is within the powers, and is the duty of the High Court on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand. My answer to the reference is in the negative.

STRAIGHT, J.—As I understand the question put by this reference, we are asked whether the findings to issues remanded by this Court in second appeal can be impeached upon their return, as if they had come from a Court of first instance. If this be a correct interpretation of the inquiry addressed to us, my answer must be in the negative. It is true that by s. 587 of the Code the provisions of chapter XLI, regulating first appeals, are declared to be applicable, "as far as may be," to second appeals, but it is obvious this does not mean that they are to be adopted indiscriminately or in their entirety. As an illustration, I will take a case in which a first Court, though recording all the evidence essential to the determination of the rights of the parties, has disposed of the suit upon a preliminary point of, say, *res judicata* or limitation, and the lower appellate Court, without dealing with it on the merits, has upheld its decision. In second appeal, this Court would have before it all the materials sufficient to enable it to pronounce judgment, and finally determine the case; but no one would seriously contend, nor has it ever been decided, that in such a state of things this Court can proceed to dispose of the suit upon the merits. In such an event, our duty and practice is to remand the case to the lower appellate Court, and direct it to proceed under s 565, or, in certain contingencies, under s. 566. Take another instance, in which a first Court has acted in the manner indicated in my illustration, but the lower appellate Court, disagreeing with its determination of the preliminary point, enters fully into the merits under s. 565, and disposes of all the matters raised by the pleadings as it is by law bound to do. Here it will

be observed that the lower appellate Court entertains and decides the issues of fact virtually as a Court of first instance, and for the first time, yet we cannot disturb those findings in second appeal unless they are open to the objections set forth in the recent ruling of the majority of the Full Bench, and then only to the extent of sending back the case for re-determination according to law But suppose it appears to this Court that the lower appellate Court has omitted to frame or try an essential question of fact, of which there is, or is not, evidence on the record, then adopting the provisions of s. 566, as far as they can conveniently be applied, it has long been the practice to remand the issue for trial, that is to say, to direct the lower appellate Court to do what it ought to have done under ss. 565, 566 or 568, as the circumstances required, and then to return the results of its findings to this Court. If this course has been adopted, I fail to see how the position is in any way altered from what it would have been had the lower appellate Court properly fulfilled its functions under ss. 565 or 566 when originally disposing of the appeal ; or why its findings of fact in obedience to the remand are to be treated on a different footing to what they would have been had they come up with the record when the second appeal was first preferred. I may add, without going at greater length into the matter, that I concur in the views expressed by Mahmood, J., in *Ramnarain* v. *Bhawanideen* (1) and *Sheoambar Singh* v. *Lallu Singh* (2), and I cannot hold that any sanction is to be implied from s. 587 of the Code to this Court's deciding questions of fact in any shape or at any stage of a second appeal. My answer to the reference, putting it into explicit terms, is, that objections to findings upon issues remanded in second appeal by this Court must be restricted to the limits within which the original pleas in second appeal are confined.

BRODHURST, J.—The question referred to the Full Bench for determination is—" Whether, when a case comes before the Court on second appeal, and an issue of fact has been remitted, the finding on that issue can be challenged upon the evidence as in first appeals ?" Under my view of the law, findings by a lower appellate Court on a remand made to it by this Court, under

(1) Weekly Notes, 1882, p. 104. (2) Weekly Notes, 1882, p. 158.

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s. 566 of the Civil Procedure Code, have not the effect of converting a second appeal into a first appeal, and this Court is not, I think, competent to consider and deal with evidence recorded on remand in second appeal in the same way that it would have done had that evidence been taken on a remand in first appeal.

This Court should, in my opinion, accept findings of fact recorded by a lower appellate Court under s. 566 of the Code, unless those findings are clearly open to the objections referred to in *Nivath Singh* v. *Bhikki Singh* (1). In their judgment in *Mahomed Kamil* v. *Abdool Luteef* (2), Couch, C. J, and Ainslie, J., observed :—"In the special appeal, our learned colleague appears to have thought that, as fresh evidence had been taken by the Subordinate Judge, the case might be heard as if it were a regular appeal, and the learned Judge considered whether the new evidence was worthy of credit, and came to the conclusion that it was not, and disbelieved it. We are not aware that there was any authority that the fact of the lower appellate Court taking additional evidence made the special appeal liable to be heard and decided as if it were a regular appeal. It does not appear to us that this is the effect of the lower appellate Court taking additional evidence, and so far we cannot agree with the learned Judge." The Code of Civil Procedure that was in force when the judgment above referred to was delivered, was Act VIII of 1859, but the ruling appears to me to be equally applicable under the present law, and the practice of the Court has hitherto, I believe, been in accordance with that ruling.

My reply to the reference is in the negative.

TYRRELL, J.—I am not aware of any reason, whether of rule or principle, why we should be deemed to be precluded from determining a question of fact by reason only of the circumstance that it arises in the hearing of a second rather than of a first appeal. It is true that a case is not made amenable to our jurisdiction under Chapter XLII because of errors in the decision of issues of fact, but where the "substantial defect in the procedure" of the Courts below [s. 584 (*c*)] has been their neglect to decide a question of fact essential to the decision of the case upon the merits (*ibid*), I do not see why this Court should not follow the

(1) *Ante*, p. 649. (2) 23 W. R. 51.

rule of s. 566, which forbids the reference of an omitted issue for trial when the evidence on the record is sufficient to enable the Court to determine such issue or question for itself. Indeed, I am unable to appreciate the practical distinction between a personal verdict and the unquestioning adoption of the verdict of another on an issue. It seems to me that the jurisdiction of Courts of second appeal in respect of questions of fact is restricted in so much as the appeal may not be entertained on "grounds" of fact (s. 584), but that, under the circumstances of s. 566, no less than under the abnormal circumstances contemplated by the recent Full Bench ruling in *Nivath Singh* v. *Bhikki Singh* (1), we may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. I agree therefore with the learned Chief Justice in thinking that the rule of s. 566 is applicable in its entirety to Courts of second appeal.

An issue to be tried in this way will, with all the evidence bearing upon it, be *res integra* before the High Court, and, as such, open to unrestricted consideration from any point of view that may be present to the Court in the argument on the evidence and otherwise. It follows then, to my mind, that in cases where the Court, still acting under s. 566, has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court. This word "finding" is of course used in s. 566, in its restricted sense of an answer to the proposition referred for inquiry, and not of an award or decision of the issue before the Court.

It seems to me that we have the evidence returned to us under s. 566 before us as fully and as much open to examination as the evidence if taken by ourselves under s. 568 would be.

That the provision of s. 568 can be adopted under Chapter XLII. will, I suppose, not be disputed, as it is covered by the authority of the Privy Council and the Indian High Courts in many decisions.

(1) *Ante*, p. 649.

1885
January 7.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Mahmood.

GOKAL SINGH AND ANOTHER (PLAINTIFFS) *v.* MANNU LAL AND ANOTHER (DEFENDANT.)*

Pre-emption—Wajib ul-arz—Co-sharers—"Village"—Effect of perfect partition on covenants contained in the wajib-ul-arz.

The *wajib-ul-arz* of a village contained a covenant among the co-sharers that, in the event of any one of them selling his share, a right of pre-emption should be enforceable, first by a "near share holder," next, by a partner in the *thoke*, and thirdly by a partner in the village. The village was subsequently divided into three separate mahals by means of a perfect partition, under the N.-W. P. Land Revenue Act (XIX of 1873).

Held that the agreement regarding pre-emption remained in force after the partition.

The term "village," as used in the *wajib-ul-arz* means a definite area of land with houses upon it, and does not necessarily imply a joint ownership of such land, inasmuch as after partition there may remain some community of interest, and things held and used in common by all the inhabitants. Every one who lives in that area has a share in it, and may therefore be regarded as a "share-holder" within the meaning of the *wajib-ul-arz*

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village called Maharajpur. The plaintiffs and defendant No. 2 were co-sharers in the village, and in 1875 they entered into an agreement that, in the event of any one of them selling his share, a near share-holder in the first instance, next, a partner in the *thoke*, and thirdly, a partner in the village, should be entitled to purchase it in preference to a stranger. This agreement was entered in the *wajib-ul-arz*. Subsequently the village was divided into three separate mahals by means of a perfect partition under the N.-W. P. Land Revenue Act (XIX of 1873). After this had been done, defendant No. 2 sold his share to defendant No. 1, a stranger, and thereupon the plaintiffs brought the present suit for the enforcement of their right of pre-emption.

The first issue framed by the Court of first instance (Subordinate Judge of Cawnpore) was—"Whether or not the settlement *wajib-ul-arz*, which was prepared prior to the partition, can be acted upon after the taking place of a complete partition?" The

* First Appeal No. 27 of 1884, from a decree of Saiyid Farid-ud-din Ahmad Subordinate Judge of Cawnpore, dated the 15th December, 1883.

second issue need not be stated. The third was—"Has the sale in dispute taken place with the consent of the plaintiffs, and after their refusal to purchase?" The fourth—"Is the amount of the sale-consideration mentioned in the sale-deed in question correct or not?"

Upon the first issue, the Subordinate Judge made the following observations:—"As to the first point, the Court holds that the *wajib-ul-arz*, which was prepared at the time of settlement, when the disputed village Maharajpur was jointly held, can have no force or effect after the time when the said village was divided into three separate mahals by means of a complete division. The *wajib-ul-arz* is a document comprising the conditions and engagements entered into by the co-sharers and co-parceners, and it can remain in force only as long as the parties executing it continue to retain the same character, and the nature of the co-parcenership and partnership is not altered. It cannot affect the persons who do not fall under the definition of co-parceners or co-sharers. By a complete division, each divided share becomes a separate mahal and a separate village, without any connection with the other co sharers. Although those shares are parts of a village which was once jointly held by the co-sharers, yet after division they become altogether separate mahals and villages, and all co-parcenership among the former co-sharers ceases to exist." In consequence of the first issue being decided against the plaintiffs, the Court did not try the other issues above set out.

The plaintiffs appealed to the High Court. It was contended on their behalf that the partition of a village by a Revenue Court could not exempt the co-sharers from their liabilities under the covenants entered in the *wajib-ul-arz*, and that, no new contract having been made at the time of partition, the former contract must be regarded as still subsisting.

Mr. *C. H. Hill* and Munshi *Kashi Prasad*, for the appellants.

Messrs. *T. Conlan* and *W. M. Colvin*, and Pandit *Bishambar Nath*, for the respondents.

PETHERAM, C. J.—In this case, an arrangement was made among three owners of shares in a village, who held those shares *jointly*, in the sense that there had been no division between them,

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that if any co-sharer should sell his share, a right of pre-emption should belong first to a near shareholder, next to a partner in the *thoke*, and thirdly, to a partner in the village. This agreement was entered in the *wajib-ul-arz*. After it had been made, what is called a "perfect partition" among the co-sharers was effected. In other words, the whole inhabitable and cultivable area of the village was absolutely divided, and the joint ownership of the shares was determined. This having been done, Mr. Conlan argues that there ceased to be any entire thing which can be called a "village" in the sense in which the term is used in the *wajib-ul-arz*, for the reason that each of the original co-sharers thenceforth was the owner of a separate property. If that argument were good, every "village" would cease to exist where there was no joint ownership. But although there may be no joint ownership in a village, there may still be some community of interest, and also a considerable community of things held and used in common by all the inhabitants, such, for instance, as roads, drains, and other things which are necessary to all Hence, even after partition, something is still left in common; and, with reference to the merits of this case, there remained enough community of interest to justify the preference given by the *wajib-ul-arz* to partners in the village over strangers in respect of the right of pre-emption. The meaning of the word "village" as used in the *wajib-ul-arz* is well understood. It means a definite area of land with houses upon it. Every one living in that area has a share in it, and may therefore be regarded as a "shareholder" within the meaning of the document in question. Here one of these share-holders wishes to sell his share. The person who desires to purchase it is also a share-holder. The case therefore falls within the terms of the *wajib-ul-arz* specifying the conditions under which the right of pre-emption may be enforced. The agreement appears to me to have been in force as well after the partition as before it. I am of opinion that the appeal should be allowed, and that the case should be sent back for a new trial upon the issues numbered (3) and (4) in the Subordinate Judge's judgment.

MAHMOOD, J., concurred.

Issues remitted.

FULL BENCH.

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February 9.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

GOBIND DAYAL (DEFENDANT) *v.* INAYATULLAH (PLAINTIFF).*
BRIJ MOHAN LAL (DEFENDANT) *v.* ABUL HASAN KHAN (PLAINTIFF).†

Pre-emption—Muhammadan Law—Muhammadan vendor and pre-emptor and Hindu purchaser—Act VI of 1871 (Bengal Civil Courts Act), s. 24—"Religious usage or institution"—"Parties"

Held by the Full Bench that, in a case of pre-emption, where the pre-emptor and vendor are Muhammadans and the vendee a non Muhammadan, the Muhammadan Law is to be applied to the matter, in adverbence to the terms of s 24 of the Bengal Civil Courts Act (VI of 1871). *Sheikh Kudratulla v. Mahini Mohan Shaha* (1) dissented from.

Per PETHERAM, C. J., and OLDFIELD, J., that, by the provisions of s. 24 of the Bengal Civil Courts Act, the Court was not bound to administer the Muhammadan Law in claims for pre-emption; but that, on grounds of equity, that law had always been administered in respect of such claims as between Muhammadans, and it would not be equitable that persons who were not Muhammadans, but who had dealt with Muhammadans in respect of property, knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Muhammadan Law, be permitted to evade those conditions and obligations.

Per MAHMOOD, J., that, by a liberal construction, the rule of the Muhammadan Law as to pre-emption is a "religious usage or institution" within the meaning of s. 24 of the Bengal Civil Courts Act, and, as such, is binding on the Courts.

Also *per* MAHMOOD, J, that the word "parties," as used in s. 24 of the Bengal Civil Courts Act, does not mean the parties to an action, but must be interpreted with the reference to the inception of the right to be adjudicated upon.

Also *per* MAHMOOD, J —The right of pre-emption is not a right of "*re-purchase*" either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title.

The history and nature of the right of pre-emption discussed by MAHMOOD, J.

Shumsh-ool-nissa v. *Zohra Bibi* (2), *Chundo* v. *Hakeem Alim-ood-deen* (3), *Ibrahim Saib* v. *Mani Mir Uddin* (4), *Moti Chand* v. *Mahomed Hossein Khan* (5), and *Dwarka Das* v. *Husain Bakhsh* (6), referred to.

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* First Appeal No. 103 of 1883, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 11th June, 1883

† First Appeal No. 135 of 1883, from an order of F. S. Bullock, Esq., Officiating District Judge of Allahabad, dated the 30th July, 1883.

(1) 4 B. L. R, 134
(2) N.-W. P. H. C. Rep, 1874, p 2.
(3) N.-W. P. H. C. Rep, 1874, p. 28.
(4) Mad H. C Rep, 26
(5) N.-W. P. H. C. Rep., 1875, p. 147.
(6) I. L. R., 1 All. 564.

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THE suits in which these appeals arose were suits to enforce the right of pre-emption. The pre-emptor and vendor were in each case Muhammadans, and the vendees were Hindus. The right in each case was based upon the Muhammadan Law, the plaintiff in the one claiming "by virtue of his being a co-sharer in the right and property sold, and also by right of vicinage," and in the other as "a partner in the property the subject of sale" In each case, the Court of first instance dismissed the suit, being of opinion that the right of pre-emption could not be enforced by a Muhammadan against a non-Muhammadan vendee; but the lower appellate Courts, being of the contrary opinion, reversed the decrees, and remanded the cases for disposal on the merits. The defendants in each case appealed to the High Court from the order of remand.

The appeals came for hearing before STRAIGHT and MAHMOOD, JJ., who referred the following question raised by them to the Full Bench: —

"In a case of pre-emption, where the pre-emptor and vendor are Muhammadans and the vendee a non-Muhammadan, is the Muhammadan Law of pre-emption to be applied to the matter, in advertence to the terms of s. 24 of Act VI of 1871?"

Munshi *Kashi Prasad*, for the appellant,

Munshi *Hanuman Prasad*, for the respondent, in No. 103.

Mr. *T. Conlan*, Babu *Dwarka Nath Banarji*, and Babu *Ram Das Chakarbati*, for the appellant,

Messrs. *W. H. Colvin* and *A. Strachey*, for the respondent, in No 135.

The following judgments were delivered by the Full Bench:—

MAHMOOD, J.—These two connected appeals have been referred together to the Full Bench as presenting the same question for determination by the Court, and I have been requested by my learned brethren to deliver my judgment first. The question is exactly the same as that which was raised in *Sheikh Kudratulla* v. *Mohini Mohan Shaha* (1). The order of reference in F. A from Order No. 135 of 1883, after alluding to certain rulings of this Court and of the Calcutta Court, and considering the great import-

(1) 4 B L R, 134.

ance of the points of law involved, refers to the Full Bench the following question:—"In a case of pre-emption, where the pre-emptor and the vendor are Muhammadans and the vendee a non-Muhammadan, is the Muhammadan Law of pre-emption to be applied to the matter, in advertence to the terms of s. 24 of Act VI of 1871?" This question presents itself to my mind in two aspects. The first is, whether s. 24 of the Bengal Civil Courts Act renders it imperative on this Court and the Courts subordinate to it to administer the Muhammadan Law in cases of this nature? The second is, What is the Muhammadan Law of pre-emption in regard to the point before us?

The first of these questions depends upon the construction to be placed on s. 24 of the Bengal Civil Courts Act (VI of 1871). In discussing this, I shall be within the recognized rules of interpretation in reviewing shortly the history of the particular section in question. It is not a new provision of the law. The principle which it embodies was recognized by the British rule at the outset of its authority in this country. The history of the recognition of this principle has been accurately traced by a learned Judge of the Indian Bench, Mr. Justice Field, at pages 169—171 of his valuable work on the *Regulations of the Bengal Code.* The legislation there described began with the Regulation of the 21st August, 1772, which laid down the exact scope of the application of the Hindu and Muhammadan Laws, and the omission to provide for cases which did not fall within the rule was supplied by the Regulation of the 5th July, 1781, which directed that "in all cases for which no specific directions are hereby given, the Judges do act according to justice, equity, and good conscience." The latter part of the rule was reproduced in s. 21 of Regulation III of 1793, and the former part of the rule was re-enacted in s. 15 of Regulation IV of 1793, which laid down that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Muhammadan laws with respect to Muhammadans, and the Hindu laws with regard to Hindus, are to be considered as the general rules by which the Judges are to form their decisions." To the two-fold rule so laid down, addition was soon after made by Regulation VIII of 1795, which enacted that "in cases in which the plaintiff shall be of a different religious persuasion from the defend-

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ant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans or other persons, not being either Muhammadans or Hindus, shall be defendants, in which cases the law of the plaintiff is to be made the rule of decision in all plaints and actions of a civil nature." The principle of applying the native laws according to the religious persuasions of the parties to the suit, and, with reference to the accident of their being arrayed as parties-plaintiffs or parties-defendants in the litigation, is an illustration of the simplicity which marks some of our oldest legislative enactments. The principle must have given rise, not only to confusion, but in some cases to positive injustice; whilst in cases where every one of the persons arrayed as parties to the suit belonged to a different persuasion, the application of the rule must have been impracticable. The experience of some years seems to have brought this difficulty into prominence, for we find that the next important piece of legislation on the subject was Regulation VII of 1832, s. 9 of which, while affirming the rules to which reference has already been made, added a new proposition as an injunction to the Courts administering justice under the East India Company. The section ran thus:—"It is hereby declared, however, that the above rules are intended and shall be held to apply to such persons only as shall be *bonâ fide* professors of those religions at the time of the application of the law of the case, and were designed for the protection of the rights of such persons,—not for the deprivation of the rights of others. Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion; or where one or more of the parties to the suit shall not be either of the Muhammadan or the Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of those laws, they would have been entitled. In all such cases, the decision shall be governed by the principles of justice, equity, and good conscience, it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles."

Such was the law at the time when the celebrated case of *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (1) was decided by the Full Bench of the Calcutta High Court. Since that time, however, the provisions which I have referred to have been repealed by the Bengal Civil Courts Act (VI of 1871), and the question is now governed by s. 24 of that Act, which provides that "where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience." It is this section with which we are directly concerned in the present case, and I have referred to the old Regulations because, without reference to them, the law in its existing form can scarcely be properly interpreted.

The question then arises :—Is pre-emption a "religious usage or institution" within the meaning of the section? It cannot come within any of the other matters enumerated. A similar question was considered by a Full Bench of this Court in connection, not with the subject of pre-emption, but with that of gift under the Muhammadan Law. This was in the case of *Shumsh-ool-nissa* v. *Zohra Bibi* (2), in which the Court was divided in opinion, Spankie, J., differing from the other three judges, Stuart, C. J., Pearson, and Jardine, JJ. The majority of the Court were of opinion that, under s. 24 of Act VI of 1871, the Muhammadan Law is not strictly applicable to questions relating to gifts, but it is equitable as between Muhammadans to apply that law to such questions. I shall presently refer to the dissentient judgment of Spankie, J., for whose opinion upon such questions I have always entertained the greatest respect. Shortly after this, the Full Bench case of *Chundo* v. *Hakeem Alim-ood-deen* (3) was decided. That repeats the same principle, but is still more to the point, because

(1) 4 B. L. R., 134. (2) N.-W. P. H. C. Rep., 1874, p. 2.
(3) N.-W. P. H. C. Rep., 1874, p. 28.

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it relates to pre-emption, and the majority of the Court held that, under s. 24 of Act VI of 1871, the Muhammadan Law is not strictly applicable in suits for pre-emption between Muhammadans, not based on local custom or contract, but it is equitable in such suits to apply that law. Here again Spankie, J., adhering to the opinion formerly expressed by him, dissented from the opinion of the majority of this Court.

Now, as to the two Full Bench cases, the opinion of the majority of this Court in regard to gift and pre-emption was that, although the Court was, as a matter of fact, bound to apply the rules of Muhammadan Law, it was so bound not by the strict terms of the first part of s. 24, but by the rule of justice, equity, and conscience, referred to in the second part. Spankie, J., on the other hand, held that the law of pre-emption, as of gift, must be applied under the first part of the section, being included under the head of "religious usage or institution." In other words, the majority thought that they might properly let *their* notions of justice, equity, and good conscience prevail over those of the Muhammadan Law, while Spankie, J., held that the Court was absolutely bound to follow that law. With all due respect to the majority in that case, I cannot help observing that the view expressed by Spankie, J., is the only one which could be accepted by a Muhammadan lawyer sitting here as a Judge. That learned Judge did not consider the question in any limited or superficial manner. He carefully and thoroughly dealt with the circumstances under which the Muhammadan Law is binding upon the Courts, and referred to the opinions expressed by Muhammadan writers, and, among others, to a work by my father, Syed Ahmed Khan Bahadur. He observed:—"It is contended that we cannot connect 'religious usage or institution' with cases of gift, and that it would be straining the ordinary acceptation of the meaning of the words to do so. But I am not satisfied that this is the case. 'Usage' ordinarily means use or long continued use, custom, practice. 'Institution' means the act of establishing, establishment, that which is appointed, prescribed or followed by authority, and intended to be permanent. One of the four senses in which the word 'institution' is used technically extends to laws, rites, and ceremonies, which are enjoyed by authority as permanent rules of conduct or of govern-

ment. So far, then, as the ordinary meaning of the word goes, I do not see anything anomalous in the suggestion that judicial questions regarding gifts may be determined according to religious usage, which includes prescription as well as custom. So if laws have been enjoined by authority to govern questions of gift and were intended to be permanent, the word 'institution' may not be misapplied. It is to be remembered that Hindu and Muhammadan laws are so intimately connected with religion that they cannot readily be dissevered from it. As long as the religions last, the laws founded on them last. Mr. Baillie has noticed this, and he remarks that Muhammadans in the provinces are more in the habit of regulating their dealings with each other by their own law, and to disregard it would be inconsistent with justice, equity, and good conscience ; and, this being so, he assumed that the Judges have been obliged to extend the operation of the Muhammadan Law beyond he cases to which it is strictly applicable under the Regulations. He quotes Macnaghten in his preface to the *Principles of Muhammadan Law*, as having arranged the order of cases in which this law has been applied by our Courts." The learned Judge then proceeds to consider the cases in which Baillie holds that the Muhammadan Law perforce applies. Then he goes on to say:—" Questions then, of gifts, pre-emption, &c., if not governed by Muhammadan Law as expressed clearly in the text of the Kuran, are controlled by religious usages founded on, or institutions enjoined by the oral law or sayings of the Prophet." And in conclusion:—" I am of opinion that the proper answer to the reference is, that the suit giving rise to it should be determined by that law (*i. e.*, the Muhammadan Law), and without reference to the principles of justice, equity, and good conscience."

Now, although the decision of the majority in that case is binding upon me, I regard the question as virtually reopened by this case, and I must therefore confess that I am unable to agree with it, and my reasons are these:—In the first place the Muhammadan Law of gift or pre-emption either is or is not law in the proper sense, by which I mean a rule of conduct binding upon the subjects of the State, and upon the Courts which the State has established. No doubt the opinion of the learned Judges leads to the same result. They also apply the Muhammadan Law,

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not *as a law*, but only as a rule enjoined by equity. In my view, equity cannot, so to speak, invent rules by which rights are to be determined : it must follow and be guided by rules which are law in the strict sense. This is implied by the maxim *æquitas sequitur legem;* and the "*lex*" to be followed must mean the law of the land in which equity is administered, and not any foreign law or any system not obligatory on the Courts. If it is supposed that equity can, in some unexplained manner, evolve rules as to gift or pre-emption without any example or analogy in the rules of law, I do not understand how the maxim is to be applied. No equity, for instance, could invent rules on the subject of inheritance or limitation, and apply them to the determination of rights. Further, if the view of the majority of the Court in the cases referred to were correct, the first part of s 24 would be superfluous. It would be easy to apply their reasoning in regard to gift and pre-emption, to marriage and inheritance, and the other matters mentioned in the section, by simply following the rule of justice, equity, and good conscience provided by the latter part of the section, and by saying that the Hindu and Muhammadan Laws were therefore to govern them.

Upon the present occasion it is unnecessary to consider whether "gift" can properly be described as a "religious usage or institution" within the meaning of s. 24. I am here concerned only with the question whether *pre-emption* can be so described. My own opinion is that it can, and although I cannot add much to the reasons given by Spankie, J., I may observe that pre-emption is closely connected with the Muhammadan Law of inheritance. That law was founded by the Prophet upon republican principles, at a time when the modern democratic conception of equality and division of property was unknown even in the most advanced countries of Europe. It provides that, upon the death of an owner, his property is to be divided into numerous fractions, according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of the heirs, unless that consent is given after the owner's death, when the reason is, not that the testator had power to defeat the law of inheritance, but that the heirs, having become owners of the property, could deal with it as

they liked, and could therefore ratify the act of their ancestor. No Muhammadan is allowed to make a will in favour of any of his heirs, and a bequest to a stranger is allowed only to the extent of one-third of the property. Under these circumstances, to allow the Muhammadan Law of inheritance, and to disallow the Muhammadan Law of pre-emption, would be to carry out the law in an imperfect manner; for the latter is in reality the proper complement of the former, and one department of the law cannot be administered without taking cognizance of the other. Among Aryan systems, which favour the notion of the inchoate rights of heirs, the rule of primogeniture, the *jus representationis*, and the exclusion of females from inheritance, except in special cases, the property is not so completely split up on the owner's death; but, under the Muhammadan system, upon a man's death, not only his children are entitled to succeed to his property, but also his wife mother, father, and other heirs, according to well-defined rules; and I myself know of a case in which, after a Muhammadan's death, his property was divided into twenty-three shares, each heir having a separate share in every parcel. If such a law of inheritance were not mitigated by the law of pre-emption, the result would be serious inconvenience, and possibly even disturbance. It is hardly necessary to add that the *zenana* system, which the Muhammadans regard as based upon religious texts, and which emphatically prohibits invasion of the privacy of a domestic habitation, lends an importance to the pre-emptive right, even when claimed *ex jure vicinitatis*, which it would not perhaps have otherwise possessed. This would go some way to support Mr. Justice Spankie's conclusions; but the point is perhaps not one of much practical importance, because, whatever view may be taken as to the right of pre-emption, all are agreed that it must be enforced by the Courts. I need only refer to one more case on this part of the subject—*Ibrahim Saib* v. *Muni Mir Uddin Saib* (1), decided by the Madras High Court, in which Holloway, J., stated the question to be—"Whether a Muhammadan can exercise the right derived from neighbourhood (*ex jure vicinitatis*) to insist upon the sale by a Hindu being made to him instead of to another Muhammadan." I concur in the conclusion arrived at by Holloway, J.,

(1) Mad. H. C. Rep., 26.

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in that case, so far as that conclusion simply answered in the *negative* the specific questions enumerated by the learned Judge. But unless the Civil Courts Act in the Madras Presidency as to the administration of the Muhammadan Law is very different to that which is in force in these Provinces, I am bound to say that there is much in his mode of treating the Muhammadan Law of pre-emption, in which I am unable to concur.

So far I have been considering the question whether the Muhammadan rule of pre-emption can, at least by a liberal construction, be described as a "religious usage or institution" within the meaning of the Bengal Civil Courts Act. Before leaving s. 24, I wish to refer to the word "*parties*," which occurs in it. And upon this point much of what I have already said as to the provisions of the old Regulations applies also to the interpretation of this section. I do not understand the word to mean the *parties to an action*, but it must be interpreted with reference to the *inception* of the right involved in the action. Any other interpretation would render the section impracticable, if not meaningless. Who are necessary *parties to an action* is a matter governed by the rules of procedure, and in a country like India, where personal laws prevail, it is not an uncommon occurrence that every one of the persons arrayed as parties to the suit belongs to a different race and religion. In such a case, it would be impossible to administer any particular law if the word "parties" in the section meant "parties to the suit." This is obviously the only interpretation which can apply to the administration of Muhammadan Law of inheritance and succession by our Courts. Indeed, cases are readily conceivable in which none of the *parties to the suit* are Muhammadans, but in which their right, having been derived by transfer or otherwise from Muhammadans, the Muhammadan Law would be the sole rule of decision, because the inception of the rights to be adjudicated upon took place under that law. This can be best illustrated by supposing the case of a Muhammadan who dies leaving a widow, a son, and a daughter, each one of whom conveys his or her share, by gift or sale in the estate of the deceased, to a Hindu, a Christian, and a Parsi, respectively. It is to my mind obvious that in a suit between these various transferees, involving the ascertain-

ment of the extent of the right of each person, the Muhammadan Law would, under the former part of s. 24 of the Bengal Civil Courts Act, be the only possible guide for decision, and that law would apply in its strictest force, notwithstanding the circumstance that none of the *parties to the suit* belonged to the Muhammadan persuasion. There is no reason for not applying the same principle to the cases to which this reference relates ; and it follows that the circumstance that some of the parties to these suits are Hindus, would not, *ipso facto*, render the Muhammadan Law of pre-emption inapplicable, but that the question must be decided with reference to the rules governing the *inception* of the pre-emptive right claimed in these two cases. This leads me to another aspect of the question. To the cases out of which this reference has arisen, both Hindus and Muhammadans are parties, and the standing Full Bench rulings of this Court, already referred to, lay down the rule that the Muhammadan Law of pre-emption is to be administered, not as a *law* by which the Courts are bound, but only on the general principles of justice, equity, and good conscience. And if this is so even in cases where *all* the parties are Muhammadans, it follows *a fortiori* that in cases like the present, where some of the parties are Hindus, the same principle would apply ; and thus the question whether the Hindu Law recognizes any rules of pre-emption naturally assumes sufficiently great importance to justify my dwelling upon it at some length ; for no rule of equity can either invent the law of pre-emption or administer it to people who never had such a law. And, in view of this circumstance, I will deal with the matter under three heads ; *first*, the history of the law of pre-emption, and its introduction into India ; *secondly*, the manner in which it has been administered by the British Courts ; and *thirdly*, the Muhammadan texts upon which my conclusions are founded.

Upon the first point, I desire to cite a passage from the introduction of Sir W. Macnaghten's *Principles and Precedents of Muhammadan Law* (p. 14). He says :—" Sales of land and other immoveable property are clogged with an incumbrance, which is not, however, peculiar to this Code. I allude to the law of pre-emption. This confers the privilege on a partner or a neighbour to preclude any stranger from coming in as a purchaser, provided

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the same price be offered as that which the vendor has declared himself willing to receive for the property to be disposed of." Then, after discussing the question whether pre-emption prevailed originally among the Hindus, he goes on to say :—"I have found in the *Maha Nirvana Tantra*, a work which chiefly treats of mythology, a passage which would seem to imply that pre-emption is recognized as a legal provision according to the notions of the Hindus. But it remains yet to be decided whether this shall be held to be practical law or not."

I hope, before ending this judgment, to contribute something to a settlement of the question which Sir W. Macnaghten regarded as undecided, having long taken an interest in the subject of pre-emption, and having considered it my duty to investigate the much-vexed question whether the right existed under the old Hindu Law, and whether the Muhammadans found it existing when they came into India. I may here quote from a very distinguished Sanskrit scholar, Dr. Rajendralal Mitra. After stating that the *Smritis*, from which the Hindu Law is derived, contain no reference to the right of pre-emption, the learned scholar goes on to say :—"The word *samanta* is everywhere defined to mean owner of an adjoining property, and not the right which such an owner has to claim precedence in purchasing his neighbour's property. The word occurs first in Manu (VIII, 258), and there it means 'neighbour,' and most of the other text-writers have since used it invariably in the same sense. The verse of Katyayana might at first sight suggest a different meaning, but the commentators leave us no option in the matter. The verse, literally translated, would mean 'a village is the *samanta* of a village, a field is said to be so of a field, a house is defined to be that of a house, from their being near to each other.' And this suggests the idea that each of the classes of land being reckoned *samanta* to a similar class, there would be no *samanta* in a dissimilar case; that is, the owner of a field or hut could not claim pre-emption for a village, and unless this be admitted, the classification becomes unmeaning. But Vijnanesvara, the author of the *Mitakshara*, commenting on the text of Yajnavalkya, does not accept this obvious and direct meaning. He says, by the words *grama*, &c., men residing thereon are indicated. And all the leading writers of digests accept this mean-

ing. Under these circumstances, it would be hazardous in a question of positive law to accept any other meaning. The practice of resorting to figures of metonymy is very common among Sanskrit writers, and we cannot urge that the interpretation of Vijnanesvara is a forced one. In so far, therefore, the argument as founded on the word *sa nanta* may be rejected as untenable. Dr. Monier Williams, in his English-Sanskrit Dictionary, has given *prakhyata* as the equivalent of *pre-emption*, but this meaning has not been given in any original Sanskrit work on law. I must therefore reject it, too, as of no value in the decision of the question at issue. The absence, however, of a concrete term to imply pre-emption does not necessarily imply the absence of such a right, and there are indications to the contrary in our law-books. Pre-emption pre-supposes living in joint families, and the desire to exclude strangers from intruding into a family-house or the privacy of a *zenana*. The Hindus felt this desire at an early period, and tried to restrain co-sharers from selling their shares to outsiders; but this device never developed itself into a positive law, and the latest digest-writer, the author of the *Dayabhaga*, in a manner sets it aside by saying that sales of undivided shares are immoral, but valid in law. In so far, the claim to pre-emption in cases where it is most urgently demanded is entirely abandoned . . . Had there been any authentic law in existence, it would have for certain been cited in some case or other, but there is no record of any such citation. These remarks are certainly not in keeping with the positive rules laid down in the *Maha Nirvana Tantra*, and quoted in the preface to Macnaghten's Muhammadan Law; but those rules, not having been recognized by any of our current law-books, cannot be held binding or authentic. It has been nowhere recognized as an authority on law. Nor has it been anywhere quoted in a law digest. Moreover, the *Tantra* is not by any means an ancient work. The belief is, that the most authentic *Tantras* number sixty-four, but the name of the *Maha Nirvana* does not occur among them, and it must therefore be accepted to be of secondary importance, even as a *Tantra*. My idea is, that the administration of law by Kazis during the Muhammadan period gave wide currency to *haq-i-shufa*, and its advantage became so apparent to the Hindus that they attempted to naturalize it by

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working on its principles in the *Tantra* in question, where an interpolation could easily be effected without any fear of detection. This must have happened three or more centuries ago."

I now quote from another eminent authority, Dr. Jolly of the University of Würzburg, in Germany, who recently acted as the Tagore Professor of Hindu Law at the University of Calcutta. He says:—"The only trace of pre-emption in the Hindu Law which I am aware of occurs in a text quoted in the *Mitakshara* and other standard law-books. It is as follows :—'Transfers of landed property are effected by six acts : by consent of fellow-villagers, kinsmen, neighbours, and co-parceners, and by gift of gold and water.' This text indicates clearly the existence in the early period of the Hindu Law of a feeling that a transfer of landed property is not valid unless the neighbours, fellow-villagers, and others who are but remotely concerned with it should have given their consent to its being effected. These persons might therefore be supposed perhaps to have been invested with a right of pre-emption. Whatever notions may have been prevalent on this subject in the early period of Hindu Law, this much is clear, that the compilers of those commentaries and digests of law on which the modern law is based did not approve of any sort of pre-emption. Thus the *Mitakshara*, in dealing with the above text, deprives it entirely of such legal significance as may have once belonged to it. The consent of fellow-villagers, according to the *Mitakshara*, is required for the publicity of the transaction merely; but the contract is not invalid without their consent. The consent of neighbours tends to obviate future disputes concerning boundaries. The consent of kinsmen and co-parceners (*dayada*) is indispensable when they are united in interest with the vendor. If they are separate from him, their consent is useful, because it may obviate any future doubt as to whether they are separated or united, but the want of their consent does not invalidate the transaction. The gift of gold and water serves to ratify the transfer of property—(see Colebrooke's *Mitakshara*, I, 230—232). This interpretation of the *Mitakshara* may be viewed as an instance of the way in which the Indian commentators used to dispose of obsolete laws. At the same time, it shows clearly that anything approaching to pre-emption was entirely foreign to the ideas of such an eminent authority as

Vijnanesvara, the author of the *Mitakshara*. Nor is there any other trace of pre-emption in the Hindu law-books. The *Tantras*, generally speaking, have never been recognized as authoritative law-books in any sense of the word."

Adopting the authority of these eminent Sanskritists, there is no doubt in my mind that the question which Sir William Macnaghten regarded as open to doubt is in reality not so, and that there has never been such a right as that of pre-emption recognized by the Hindu Law, though I cannot forget that the rule of that law which prohibits any member of a joint undivided family from selling his share in the joint property without the consent of his co-parceners, aims at a result not dissimilar to that which the Muhammadan Law of pre-emption is intended to achieve. The fact that some of the parties concerned in the present cases are Hindus, need not therefore in itself complicate the question as to the applicability of the Muhammadan Law, nor create any such difficulty as would otherwise have arisen with regard to the question how the rule of pre-emption is to be administered according to justice, equity, and good conscience, in a case where, some parties being Hindus and the other Muhammadans, the law of each provided different rules for the enforcement of the pre-emptive right.

I now turn to the case-law upon the subject. In *Ramrutun Singh* v. *Chunder Naraen Rai* (1), which is the earliest reported case, having been decided in 1792, it was held by the Bengal Sadr Diwani Adawlat, that among the holders of separate shares of an hereditary zamindari, each, according to the Hindu Law, may sell his share to whom he pleases, and the other sharers have no necessary right of pre-emption. And in *Ram Kanhaee Rai* v. *Bung Chund Bunhoojea* (2), decided in 1820, it was held that vicinage and partnership did not confer any right of pre-emption according to the Hindu Law as current in Bengal. A similar view of pre-emption was taken by the Madras Diwani Adawlat in *Kristnien* v. *Sendalangara* (3), decided in 1849. In that case, before judgment was delivered, the Pandits who were at that time consulted as assessors upon points of Hindu Law, gave it as their

(1) 1 S. D. A Rep., 1. (2) 3 S. D. A. Rep., 17.
(3) 3 Morley's Digest, p. 311.

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opinion that no general right of pre-emption existed under that law, and could not be enforced except in cases "where there exists a resolution in a village to the effect that a share-holder in such village should sell his land only to another shareholder of the same village, and if an inhabitant sell his estate to a stranger or to the inhabitant of another village, the other inhabitants of the village where the estate in question is situated, are competent to claim the right of pre-emption of such estate." This, however, only shows that special local custom, when duly adopted, would override the general Hindu Law. These cases leave no doubt in my mind that the Courts have never recognized the rule of pre-emption as a part of the Hindu Law.

The law of pre-emption is essentially a part of Muhammadan jurisprudence. It was introduced into India by Muhammadan Judges who were bound to administer the Muhammadan Law. Under their administration it became, and remained for centuries, the common law of the country, and was applied universally both to Muhammadans and Hindus, because in this respect the Muhammadan Law makes no distinction between persons of different races or creeds. "A Musalman and a *Zimmee* being equally affected by principles on which *shafa* or right of pre-emption is established, and equally concerned in its operation, are therefore on an equal footing in all cases regarding the privilege of *shafa*." (Hamilton's *Hedaya*, vol. III, p. 592). What was the effect of this? In course of time, pre-emption became adopted by the Hindus as a custom. I may here refer to an official paper printed in the *Revenue Reporter*, Vol. V, at p. 150, in which it is said that the rule of pre-emption has been adopted as a custom almost universally throughout these Provinces, even by villages which are purely Hindu. I have already in *Zamir Husain* v. *Daulat Ram* (1), and in the recent case of *Sheoratan Kuar* v. *Mahipal Kuar* (2), explained my views as to the manner in which this custom has been adopted by the Hindu community.

Now, there can be no question that the Muhammadan Law of pre-emption must be administered in cases in which *all* the parties concerned are Muhammadans. The question is, whether it should be administered in cases in which only the vendee is a

(1) I. L. R., 5 All. 110. (2) *Ante*, p. 258.

Hindu. Before expressing my own view of the matter, I think it will be useful to review the case-law on the subject, and to ascertain how it stands at present. The most important of the cases is that of *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (1). It was there ruled by a majority of the Judges of the Calcutta High Court (Peacock, C. J., and Kemp and Mitter, JJ.), that a Hindu purchaser is not bound by the Muhammadan Law of pre-emption in favour of a Muhammadan co-parcener, nor is he bound by the Muhammadan Law of pre-emption on the ground of vicinage, because the right of pre-emption in a Muhammadan does not depend on any defect of title on the part of his Muhammadan co-parcener to sell except subject to his right of pre-emption, but upon a rule of Muhammadan Law which is not binding on the Court, nor on any purchaser other than a Muhammadan. The minority (Norman and Macpherson, JJ.), on the other hand, held that whenever a Muhammandan co-sharer or neighbour has a right of pre-emption, when property is sold by his neighbour or co-sharer, also a Musalman, his right is not defeated by the mere fact that the purchaser is a Hindu. The ruling of the majority of the Court was adopted by a Division Bench of this Court in *Moti Chand* v. *Mahomed Hossein Khan* (2). These two cases are clear authorities against the opinion which I hold. Upon the converse of the proposition which they laid down, I may refer to a case in which the pre-emptor was a Muhammadan, the vendor a Hindu, and the vendee a Muhammadan. This was the Full Bench case of *Chundo* v. *Hakeem Alim-ood-deen* (3), in which it was ruled (Spankie, J., dissenting), that the application of Muhammadan Law in a suit for pre-emption between a Muhammadan claimant of pre-emption and a Muhammadan vendee on the basis of that law, is *not* precluded by the fact of the *vendor* not being a Muhammadan. The rule so laid down was the only one which could be adopted consistently with the principle on which the two last mentioned cases were decided. But it was subsequently and formally over-ruled in the Full Bench case of *Dwarka Das* v. *Husain Bakhsh* (4), in which it was held (Stuart, C. J, and Pearson, J., dissenting) that where the vendor is a Hindu, a suit to enforce a right of pre-emption

(1) 4 B. L. R., 134.
(2) N.-W. P. H. C. Rep., 1875, p. 147.
(3) N.-W. P. H. C. Rep., 1874, p. 28.
(4) I. L. R., 1 All. 564.

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founded upon Muhammadan Law is not maintainable. In this case, the majority of the Court followed in principle the judgment of Couch, C. J., in *Poorno Singh* v. *Hurrychurn Surmah* (1), where it was held that the right of pre-emption arises from a rule of law by which the owner of the land is bound, and that it is essential that the *vendor* should be subject to that rule of law.

I have read these cases carefully, and it appears to me impossible to reconcile them. The most important of them are *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (2), and *Dwarka Das* v. *Husain Bakhsh* (3), in which a Full Bench of the Calcutta High Court and a Full Bench of this Court respectively laid down two propositions, one being, so to say, the converse of the other. Bearing in mind the rules of the Muhammadan Law of pre-emption, it seems to me impossible to hold that both of these decisions can be right. I know that, as a matter of pure logic, it does not follow because a proposition is true, that its converse must be true also; and it is obvious that, as a matter of pure reasoning, if a Muhammadan pre-emptor cannot enforce pre-emption against a Hindu purchaser, the vendor being a Muhammadan, it does not necessarily follow that a Muhammadan *can* enforce pre-emption where the vendor is a Hindu and the purchaser a Muhammadan. But the exigencies of the definite rules of the Muhammadan Law of pre-emption happen to be such as to render it essential that the various propositions relating to the subject should be governed by a common principle, and therefore consistent with each other. I may illustrate my meaning by supposing concrete cases.

In all cases of pre-emption there are three parties to be considered,—the pre-emptor, the vendor, and the purchaser. And so far as the question now under consideration is concerned, different cases may be imagined by supposing all, or one, or two of these three parties to be Hindus or Muhammadans. The simplest and ordinary case is where *all* the three parties concerned are Muhammadans, and in such circumstances it is obvious, as was indeed admitted by Mitter, J., and the learned Judges who agreed with him in the case of *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (2), that the Muhammadan Law would apply,—a proposi-

(1) 10 B. L. R., 117. (2) 4 B. L. R., 134.
(3) I. L. R., 1 All. 564.

tion which, as a matter of law, though not of logic, necessarily implies a negative answer where *all* the parties to a pre-emptive suit are Hindus. Nor can there be any difficulty in holding that, for similar reasons, the same negative answer must be given in a case in which the pre-emptor being a Muhammadan, both the vendor and the vendee are Hindus; or conversely, where the pre-emptor being a Hindu, both the vendor and vendee are Muhammadans. And to carry the reasoning further, the same negative answer must be given where, both the pre-emptor and the vendor being Hindus, the only party who is Muhammadan is the vendee. Nor would any one maintain that the Muhammadan Law would govern a pre-emptive suit in which the pre-emptor and the vendee are both Hindus, and only the *vendor* is a Muhammadan. Indeed, I am not aware of a single case in which the Muhammadan Law *as such* has been held applicable in any of such circumstances. The reason of the negative answer is that, although the Muhammadan Law of pre-emption makes no distinction of race or creed, that law, from being the common law of the land, applicable alike to Hindus and Muhammadans, has been reduced to the status of being a personal law of the latter, who alone can enforce the rights or incur the obligations created by that personal law. Rights derived from members of that community, whether by Hindus or by other non-Muhammadans would, of course, be governed by the Muhammadan Law, because, as I have already explained, the *inception* of the right and not the array of the parties *to the suit* must be the turning point of the decision within the meaning of s. 24 of the Civil Courts Act. But because a Hindu is not under that section subject to the Muhammadan Law of pre-emption, he cannot avail himself of any pre-emptive right which that law creates only in favour of those who are subject to its behests. And the reason is simple. The rights and obligations created by that law, as indeed by every other system with which I am acquainted, must necessarily be reciprocal. Then, if a Hindu cannot as a pre-emptor avail himself of the Muhammadan Law of pre-emption in a case where the *vendor* is a Muhammadan and the *purchaser* is a Hindu, what reason is there for holding that a Muhammadan pre-emptor *can* enforce the pre-emptive right where the *vendor* is a Hindu and the purchaser a Muhammadan? The question was discussed by this Court in the

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Full Bench case of *Chundo* v. *Hakeem Alim-ood-deen* (1), and the majority of the Court gave an *affirmative* answer upon a reasoning which must necessarily lead to the conclusion that an *affirmative* answer should also be given to the proposition which, as I have just stated, can only be answered in the *negative*. Indeed, the untenability of the proposition, as already pointed out, was not long afterwards enunciated by the majority of the Full Bench of this Court in *Dwarka Das* v. *Husain Bakhsh* (2), which furnishes an answer in the *negative*, perfectly consistent with my own view,—an answer which gives full effect to an important portion of the reasoning adopted by Mitter, J., in *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (3), though it controverts the conclusion at which the learned Judge arrived. He says (p. 147) :—"If we decide this case against the Hindu purchaser, and thereby deprive him of a property which has already become his by the law of his country, we must bear in mind that we have already decided that, so far as he is concerned, he will never be able to enforce any right of pre-emption even though a Muhammadan should choose to purchase a part of his family house from one of his coparceners. So long as this country was under the Muhammadan Government, the right of pre-emption was extended to all classes of persons without any distinction of creed, color or birth, inasmuch as no such distinction was recognized in that respect by the Muhammadan Law, which was in fact the law of the land. Now that the Muhammadan Law has ceased to be the law of the country, it seems to me to be manifestly unjust and inequitable that we should enforce the Muhammadan Law of pre-emption against a Hindu, without given him the benefit of that law in other cases in which he would like to stand in the position of a pre-emptor."

I have said enough to show that with a great deal of the reasoning upon which this passage proceeds I entirely concur. But I reject the conclusion, because the necessary steps leading to it are based upon what I may respectfully call fallacies as to the rules of the Muhammadan Law of pre-emption. These I shall presently discuss at some length; but I may here make some observations with reference to the illustration given in the passage,

(1) N. W. P. H. C. Rep., 1874, p. 28. (2) I. L. R., 1 All. 564.
(3) 4 B. L. R., 134.

namely, the case of a Hindu co-parcener selling his share in his family-house to a Muhammadan. I should unhesitatingly say in such a case that the sale was subject to the incidents of the Hindu Law which governed the rights of the *vendor*, that if that law provided a rule of pre-emption, the rule should be enforced against the Muhammadan purchaser, whether his law recognized it or not. In such a case there can be no question of the Muhammadan being deprived of a "property which has already become his by the laws of his country." He bought it subject to the rules which governed it in the hands of his vendor, from whom he has derived his title, and the circumstance that he is not a Hindu will not save him from the incidents of the Hindu Law. Indeed, in the case supposed, as the law stands, the Muhammadan purchaser would no doubt be free from a pre-emptive claim at the instance of his Hindu vendor's co-parceners. But he would be free only because the Hindu Law provides no pre-emptive right. He would, however, be liable to something "worse," by reason of that law which governed the property in the hands of his vendor. The sale might be avoided at the instance of the Hindu co-parcener, if the subject of the sale was a share in joint property. And if it can be shown that property in the hands of a Muhammadan is *in principle* as much subject to the pre-emptive claim of his Muhammadan co-parcener or neighbour as the marital estate in the hands of a Hindu widow, or the share of a member of a Hindu joint family, is subject to its own restrictions or qualifications as to sale, it seems to me that the enforcement of the Muhammadan rule of pre-emption agaisnt the Hindu purchaser from a Mnhammadan would be anything but "manifestly unjust and inequitable." And once this proposition is established, it will be obvious that all the exigencies of Mr. Justice Mitter's reasoning, contained in the passage cited, are satisfied by the *ratio decidendi* in *Dwarka Das* v. *Husain Bakhsh* (1), wherein the majority of the Full Bench of this Court *declined* to enforce the Muhammadan rule of pre-emption in a case in which the vendor was a Hindu, although the pre-emptor and the purchaser were both Muhammadans. For if the *ratio decidendi* of that ruling is correct, the matter stands thus :—Property in the hands of a Muhammadan *is* subject to the

(1) I. L. R., 1 All. 564.

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pre-emptive claim of his Muhammadan coparcener or neighbour; property in the hands of a Hindu *is not* so subject to the Muhammadan rule of pre-emption. The Muhammadan *can* claim the benefit of the law of pre-emption. The Hindu *cannot* claim the benefit of that law. These propositions, which seem to me to be intelligible, consistent, and equitable, would meet all the objections which Mitter, J., contemplated; and, if they are correct, there can be no question of either the Hindu or the Muhammadan being "deprived" of his right by reason of the law of the other. The pre-emptive rights and obligations between Muhammadan co-parceners and neighbours being mutual, the principle of the maxim *qui sentit commodum sentire debet et onus* applies, but it would not apply in the case of a Hindu where no such reciprocity exists. And if the Hindu purchaser is to be affected by the Muhammadan pre-emptive claim, it would be on the principle of a cognate maxim that land passes with its burdens, *terra transit cum onere*, and there would be no violation of the notions of justice, equity, and good conscience.

This, however, begs the whole question, and having already supposed the various cases in which it would arise on account of the difference in religion of the partners in a pre-emptive case, the only case which remains to be conceived is one in which the pre-emptor and the vendor are both Muhammadans, and the only non-Muhammadan among the parties is the vendee. This is the case now before us, and to the question whether the Muhammadan law of pre-emption is applicable to such a case, my answer is in the affirmative. But because the authority of Sir Barnes Peacock and Mr. Justice Dwarka Nath Mitter demands the highest respect from me, as from every one else connected with the administration of justice in British India, I feel myself bound, in differing with them, to explain my reasons fully by reference to original texts of the Muhammadan Law of pre-emption, which I cannot help feeling would have led those eminent Judges to a different conclusion had the texts been accessible in the English language. I make this observation because Sir Barnes Peacock at the beginning of his judgment in the celebrated case of *Sheikh Kudratulla* v. *Mahini Mohan Shaha*

(1), used expressions which leave no doubt that, even after the case had been argued before him in the Full Bench, his Lordship was inclined to form an opinion similar to that which I have formed in this case, and that he adopted the opposite view in consequence of the opinion which had been "so forcibly and clearly expressed by Mr. Justice Mitter." And because the judgment of that learned Judge in the most exhaustive and powerful manner presents the opposite view to that which I hold in this case, the best way in which I can justify my own opinion is to examine the reasoning leading to the conclusions which he and the majority of the Court adopted in that case.

Dealing thus with the question now before us, I may remark, in the first place, that I entirely agree with Mr. Justice Dwarka Nath Mitter in holding that the answer to the question depends upon the *nature* of the right of pre-emption under the Muhammadan Law. I also concur generally in the following remarks (p. 140):—"If that right is founded on an antecedent defect in the title of the vendor, that is to say, on a legal disability on his part to sell his property to a stranger, without giving an opportunity to his co-parceners and neighbours to purchase in the first instance, those co-parceners and neighbours are fully entitled to ask the Hindu purchaser to surrender the property, for although as a Hindu he is not necessarily bound by the Muhammadan Law, he was at any rate bound by the rule of justice, equity, and good conscience, to inquire into the title of his vendor; and that very rule also requires that we should not permit him to retain a property which his vendor had no power to sell. If, on the contrary, it can be shown that there was no such defect in the title of the vendor, or in other words, that he was under no such disability, even under the Muhammadan Law itself, it would follow, as a matter of course, that there was no defect in the title of the purchaser at the time of its creation." Further on he says: "Now, so far as I can judge of the Muhammadan law of pre-emption from the materials within my reach, it appears to me perfectly clear that *a right of pre-emption is nothing more than a mere right of repurchase, not from the vendor, but from the vendee*, who is treated for all interests and purposes as the full

(1) 4 B. L. R., 134.

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legal owner of the property which is the subject-matter of that right." In this passage, Mitter, J. referred to the materials upon which he based his conclusion, and he proceeds to quote passages from those materials. On this point I have to say that those materials appear to me to be in several respects inadequate. They are to be found in the *Hedaya*, or rather in the translation of the *Hedaya* made by Mr. Hamilton about a century ago, under the orders of the Governor-General, Warren Hastings. It was not, however, a translation of the original Arabic text, but of a Persian translation. For that work gratitude is due to Mr. Hamilton, but at the same time I am afraid it has been sometimes the source of mistakes by our Courts in the administration of the Muhammadan Law. Mitter, J. says that he is satisfied by certain passages in this work, that the conclusions at which he arrived were consistent with the Muhammadan law of pre-emption. I need not quote any more passages from the learned judgment, as I purpose to analyse all the main arguments adopted by the majority—Peacock, C. J., Kemp and Mitter, JJ. The first proposition which those learned Judges laid down was, that *the right of pre-emption under the Muhammadan Law does not exist before actual sale*, because, on the one hand, the pre-emptor has no right of prohibiting the sale, and, on the other hand, the vendor is not bound to offer the property for purchase to the pre-emptor before selling it to the stranger; and they held their view to be supported by the circumstance that the pre-emptor cannot *before* such sale relinquish his pre-emptive right, nor could the absence of his consent vitiate the sale. Upon this reasoning they held that a Muhammadan owner of property was subject to no *legal disability* arising out of pre-emption, but was free to sell it regardless of that right. They then proceeded to lay down the *second* main proposition that a sale, in respect of which pre-emption might be claimed, passed full ownership to the vendee, and did not involve "any defect of title," because it could not be regarded as an infringement of a pre-existing pre-emptive right. From this the learned Judges concluded that the right of pre-emption under the Muhammadan Law was "a mere *right of re-purchase*, not from the *vendor*, but from the *vendee*," which right could not be enforced by a Muhammadan pre-emptor against a Hindu *vendee*,

because the property, even in the hands of the Muhammadan *vendor*, not being subject to the pre-emptive right at the time when the title of the Hindu *vendee* was created by the sale, the right could not run with the land, nor follow it in the hands of a stranger not subject to the Muhammadan Law. These are the main conclusions at which the learned Judges arrived, and the rest of their reasoning seeks to support those conclusions by the argument that, under the Muhammadan Law, the right of pre-emption is a right "feeble" and "*defective*," because, according to the rules of that law it can be easily defeated by devices which Mitter, J. designated as "*tricks and artifices*."

I believe in giving this analysis I have exhausted all the arguments which the learned Judges employed in arriving at the view to which I am opposed. But if it can be shown from the original texts of the Muhammadan Law itself that the main propositions upon which the whole argument proceeds are in themselves erroneous, I think I shall have justified my view. First, then, as to the *nature* of the right. I remember the salutary warning of the Roman jurist Javolenus (whom Creasy, C.J., has quoted in his work on *International Law*), that the task of laying down definitions is not only "the most laborious, but also the most perilous." The exigencies of this case, however, require that I should endeavour to define the right of pre-emption as prescribed by the Muhammadan Law; and I think I am strictly within the authorities of that law when I say that pre-emption is a right which the owner of certain immoveable property possesses, as such, for the quiet enjoyment of that immoveable property, to obtain, in substitution for the buyer, proprietary possession of certain other immoveable property, not his own, on such terms as those on which such latter immoveable property is sold to another person. I could easily support every word of this definition by original Arabic texts of the Muhammadan Law itself, but I will confine myself only to such texts as bear immediately upon the main propositions involved in this case. I may, however, observe that the *nature* of the right, as appears from the definition which I have given, partakes strongly of the nature of an easement,—the "*dominant* tenement" and the "*servient* tenement" of the law of easement being terms extremely analogous to what I may respectively call the "*pre-emptive* tene-

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ment" and "*pre-emptional* tenement" of the Muhammadan Law of pre-emption. Indeed, the analogy goes further, for I shall presently show that the right of pre-emption, like an easement, exists before the injury to that right can give birth to a cause of action for a suit,—sale in the one case corresponding to the invasion of the easement in the other. In short, I maintain that, under the Muhammadan Law, the rule of pre-emption, proceeding upon a principle analogous to the maxim *sic utere tuo ut alienum non lædas*, creates what I may call a legal servitude running with the land ; and the fact that that law has ceased to become the general law of the land cannot alter the *nature* of the servitude, but only render its enforcement dependent upon the religion of the party who claims the servitude and of the party who owns the property subject to that servitude.

Now, the main authority upon which the learned Judges relied for the view that the right of pre-emption does not exist before sale, is a passage in Mr. Hamilton's *Hedaya* to be found at page 568, Vol. III, of his translation. The translation is at its best a very loose one when compared with the original Arabic text, which I shall literally translate here :—" Pre-emption becomes obligatory (*i.e.*, enforceable) by a contract of sale, which means after the sale. Not that sale is the cause (of pre-emption), for the cause is conjunction (of the properties) as we have already mentioned. And the reason in the matter is, that pre-emption becomes obligatory when the seller has turned away from (*e.i.*, wishes to get rid of) the ownership of his house, and the sale makes this apparent. Hence, proof of sale is sufficient as against him even to the extent of the pre-emptor taking it (the house) when the seller acknowledges the sale, although the buyer contradicts him." (1) The meaning to be evolved from the passage is obviously different from the interpretation which can be placed upon Mr. Hamilton's translation, which indeed seems to me to have misled Mitter, J., and the other learned

(1) الشفعة تجب بعقدالبيع معناه بعده لا انه هوالسبب لان سببها الاتصال على مابيناه والوجه فيه ان الشفعة إنما تجب إذا رغب البايع عن ملك الدار والبيع يعرفها و لهذا يكتفي بثبوت البيع في حقه حتى ياخذها الشفيع إذا اقرالبايع بالبيع و ان كان المشتري يكذبه *

Judges who agreed with him. The Arabic word *tajibo* which occurs in this and other passages, and which Mr. Hamilton translated as "*established*," really means "becomes *obligatory*, *necessary* or *enforceable*" as a term of law, and I cannot help feeling that if the passage had been accurately translated by Mr. Hamilton, the majority of the Full Bench in *Sheikh Kudratulla's* case might possibly have arrived at a very different conclusion. It is unnecessary to quote any more passages from the original Arabic text of the *Hedaya*, which distinctly go to show that the cause or foundation of the right of pre-emption is the conjunction of the pre-emptive tenement with the pre-emptional tenement, that its object is to obviate the inconvenience or disturbance which would arise by the introduction of strangers, that the right exists antecedently to sale, and that sale is a condition precedent, not to the *existence* of the right, but only to its *enforceability*. Mr. Hamilton's translation is sufficiently accurate to indicate these conclusions, and I shall therefore pass on to other books as high in authority as the *Hedaya* itself. Here is a short text from the *Durrul-Mukhtar* :—"The cause of pre-emption is the contiguousness of the pre-emptor's property with the purchased property, whether by co-parcenership or vicinage." (1) Again, a more explicitpassage is to be found in *Aini*, a commentary upon the *Kanz* :—"The author (of the *Kanz*) says '*by sale*,' which must be referred to his expression, '*pre-emption becomes obligatory*.' This would indicate that the cause of the obligatoriness of pre-emption is sale, that is the sale of the pre-emptional house, and some have held this very opinion. The correct opinion, however, is that the cause of pre-emption is the conjunction of the properties in a necessary manner, and sale is a condition (of pre-emption). From this it follows that pre-emption becomes enforceable by sale, that is, after its coming into existence." (2) All the different views on the subject enter-

(1) و سببها اتصال ملك الشفيع بالمشتري شركةً اوجواراً ر درالمختار صفحه ٦٩٧)

(2) قوله بالبيع يتعلق بقوله تجب اشار بهذا ان سبب وجوب الشفعة البيع اعنى بيع الدار المشفوعة هكذا قال بعضهم والصحيح ان السبب هو اتصال الاملاك على اللزوم والبيع شرط فحينئذ يكون التقدير تجب الشفعة بعقد البيع اي بعد وجوده (عيني شرح كنز جلد دوم صفحه ٢٣٨) *

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tained by Muhammadan jurists, who were only too fond of the mediæval schoolmen's method of arguing such questions, are to be found in *Birjandi*, a well-known commentary on the Muhammadan Law :—"Be it known that the language of the author implies that the cause of the obligatoriness of pre-emption is the conjunction of the pre-emptor's property with the subject of the sale in some way or other, and this is the opinion adopted by the *Mashaikhs* (elders) in general. Khassaf says that pre-emption becomes enforceable by sale, then by demand, and therefore both become the cause ; but as to this it may be said that when pre-emption is established by sale, there is no meaning in establishing it a second time by demand. Sheikh Abubakr Razi used to maintain that pre-emption becomes enforceable by sale, the right of taking possession is established by demand, and ownership (of the pre-emptor) is established either by decree or by mutual consent. Sheikh-ul-Islam held that co-parcenership, together with sale, constitutes the reason of the enforceability of pre-emption, and it is emphasized by demand, and ownership is established either by decree or by mutual consent, and so it is laid down in the *Zakhira*." (1) These texts leave no doubt in my mind that the "cause" or foundation of pre-emption is "*conjunction*" of the pre-emptor's property with that of the vendor, and, inasmuch as such conjunction existed before the sale, it follows that the pre-emptive right originates antecedently to the sale in respect of which it may be exercised. For example, when two Muhammadans own shares in a house, the share of each may in turn be regarded as dominant or servient to the other for purposes of pre-emption, because the conjunction of the properties of the two owners being a circumstance common to both, alternately entitles the other to claim pre-emption when the proper occasion arises, that

(1) اعلم ان كلام المصنف مشعر بان سبب وجوب الشفعة هو اتصال ملك الشفيع بالمبيع بوجه من الوجوه و الى هذا ذهب عامة المشائخ و ذكر الخصاف ان الشفعة تجب بالبيع ثم بالطلب فيكون كلا هما سبباً وفيه انه إذا ثبت بالبيع فلا معني لثبوتها ثانياً بالطلب وكان الشيخ ابوبكر الرازي يقول الشفعة تجب بالبيع و حق الاخذ يثبت بالطلب والملك يثبت بالقضاء اوبالرضاء و ذكر شيخ الاسلام إن الشركة مع البيع علة لوجوب الشفعة و تاكدها بالطلب و ثبوت الملك بالقضاء اوبالرضاء كذا في الذخيرة (برجندي صفحه ۲۰۱) *

is, when either transfers his share by sale. The analogy of a non-apparent easement again suggests itself. It is true, as Mitter, J. says, that neither can prevent the other from selling his share to whomsoever he pleases, because the Muhammadan Law "nowhere recognizes any right of *veto* in the pre-emptor," nor does it impose any "positive legal disability" on the vendor in this respect. This, no doubt, at first sight suggests a distinction in principle between pre-emption and non-apparent easement, such as a right annexed to *A's* house to prevent *B* from building on his own land. But the distinction, so far as the question of the origin of right is concerned, is in reality not one of principle, but of detail, arising from the difference in the nature of the occasion demanding the exercise of the right. In the one case, that occasion is sale; in the other, it is building. Now, it is true that in the one case the pre-emptor cannot prevent his co-parcener from selling his property to a stranger, whilst in the case supposed, *A* could prevent *B* from building on his land. But the reason of the distinction is not that the right of the one did not exist before the sale, and the right of the other did exist before the building. The reason is this. The object of the non-apparent easement possessed by *A* is the beneficial enjoyment of his own property, and *definite* infringement of that right is ascertained when *B* takes any definite action to build upon his land,—a state of things which would be sufficient to afford a cause of action in favour of *A*, seeking preventive relief or other assertion of his right of easement. But in the case of pre-emption, the *object* of the right is to prevent the intrusion, *not* of *all* purchasers in general, but only of such as are objectionable from the pre-emptor's point of view. Again, the right (unlike the right of *veto* possessed by members of a joint Hindu family with respect to the sale of his share by any one of them) is not free from definite qualifications, among which the most important is that the pre-emptor complaining of the intrusion of the purchaser should place himself absolutely in the position of the purchaser with reference to the terms of the contract of sale, such as the amount and payment of the price, &c. It is obvious, then, that before a pre-emptor can make up his mind to assert his pre-emptive right, he must, *ex necessitate rei*, know definitely who the purchaser is, and under what terms he has purchased the property, because it may

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well be that, on the one hand, he may have no objection to such purchaser, and on the other hand, even if he does object, he may not be in a position to pay the price which the purchaser has paid. No such considerations exist in the case of the right of *easement* which I have supposed by way of illustration. And it follows that before a sale is actually completed, the pre-emptor is not, *ex necessitate rei*, in a position to have definite information as to whether the proper occasion has arisen for the exercise of his already existing pre-emptive right. This is the reason why the law gives him no right of vetoing the sale. But the reason falls far short of showing that his right of pre-emption was wholly non-existent at the time of the sale, when the title of the purchaser was created. From what I have already said, it is perfectly clear to me that any action on the part of the pre-emptor before the sale would be premature, whether such action consisted of vetoing or consenting to a sale which has not yet been effected, and of which the terms and the purchaser have not yet been ascertained, in the sense of creating the legal rights and obligations which render a sale an accomplished fact in law. I have already said that, unlike the *veto* possessed by a member of a joint Hindu family, the right of pre-emption does not prohibit sale *in general* regardless of the purchaser, of the amount of the price, and other terms of the contract of sale; and because the right is in its very nature incapable of being asserted or exercised till these matters are definitely ascertained, it follows that a sale, irrespective of the pre-emptor's consent, is not void in law. The pre-emptive right may or may not be asserted or enforced; and it would be absurd to say that that which is only possible should, by a retrospective effect, vitiate that which is certain, namely the sale. This is the manner in which the jurists of the Muhammadan law have dealt with this point of the rule of pre-emption, and it is upon very similar grounds that they hold the pre-emptor incapable of relinquishing his pre-emptive right in respect of a sale which has not yet taken place. They would say (and there is ample authority for this statement) that the identity of the purchaser, the amount of the price, and other terms of the sale, the certainty of which is essential, not to the *existence*, but to the *exercise* of the pre-emptive right, being still undefined by a legal relation between the vender and the vendee, the pre-emptor had no

means of knowing for certain whether he should or should not give up an ascertained legal right, and therefore the relinquishment of pre-emption before sale is void. Whatever the merits of this reasoning from a jurisprudential point of view may be, I confess I fail to see how it supports the view that the right of pre-emption does not exist as a restriction or qualification of the right of sale possessed by the owner of property subject to pre-emption. It is indeed not an absolutely unqualified disability, for it does not absolutely prohibit sale without the consent of the pre-emptor. But that it amounts to a qualified disability, distinctly operating in derogation of the vendor's absolute right to sell the property, and thus affects his title, which would otherwise amount to absolute dominion, cannot, in my opinion, be doubted. That the results of such restrictions or qualifications are dependent for their enforcement upon the occurrence of the actual sale, is a circumstance which, in my opinion, does not affect the question relating to the inception of the right of pre-emption.

But, in opposition to this view, Mitter, J., and the learned Judges who concurred with him, relied upon the argument that "there is nothing whatever in the Muhammadan Law which imposes upon any one the obligation of making the first offer to his neighbour, nor is there anything to show that the right of pre-emption is based upon any such obligation, the non-fulfilment of which would prevent the stranger from acquiring a complete and valid title to the property by virtue of his purchase." In dealing with this argument, I must, in the first place, observe that one of the greatest difficulties in the administration of the Muhammadan Law, as indeed of all ancient systems, lies in distinguishing *moral* from *legal* obligations. The Muhammadan Law having been evolved from the Kuran and the sayings of the Prophet, naturally presents such difficulties, and the question whether the vendor is bound to offer the property to his co-parcener before selling it to a stranger, is an illustration of what I mean,—a difficulty which was felt at an early stage by the Muhammadan jurists themselves. The following is a text from *Aini*, a commentary upon the *Kanz*, a well-known book on Muhammadan jurisprudence :—"A co-parcener is one whose share has not been divided in the property sold. This is universally agreed upon, because it has been relat-

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ed by Jahir that the Prophet decreed pre-emption in respect of every joint undivided property, whether a grove or a house, saying:—'It is *not lawful* for any one to sell till he has informed his co-parcener who may take or leave it as he wishes; and if he has sold without such information, the co-parcener has a preferential right to the share.' This tradition has been related by Mushini, Abu David, and Aukissai." (1) Two other traditions to the same effect are also to be found in *Muslim*, which is one of the books of acknowledged authority on *Hadis* or traditions. I will, however, quote only one of them, as it brings into prominence the difficulty with which I am now dealing:— "It is related by Jahir that the Prophet said:—'Pre-emption exists in all joint properties, whether land, or house, or grove. It is *not proper* for him (the owner) to sell till he has offered it to his co-parcener, who may take it or reject it; and if the vendor fails to do this, his co-parcener has the preferential right to it until he is informed." (2) Both these traditions have much the same effect, but in the first of them the Arabic word *la yahillo* occurs, which I have rendered by "*not lawful*;" whilst in the second the phrase employed is *la yasliho*, which I have translated as meaning "*not proper*." The importance which the Muhammadan jurists, in laying down legal principles, attached to the exact words in the sayings of the Prophet, at once gave rise to the question whether the injunction as to the vendor's giving notice to the pre-emptor and offering to him the property for purchase, was a mere *moral* behest or created a legal obligation. I have already shown how Muhammadan jurists dealt with the right of pre-emption, and the method of arguing which they adopted had no doubt considerable influence

(1) الشريک الذي لم يقاسم في نفس المبيع هذا بالاجماع لما روے جابر رضی الله عنه ان النبي صلی الله عليه و سلم قضی بالشفعة في كل شركة لم تقسم ربعاً اوحايطاً لايحل له ان يبيع حتی يوذن شريكه فان شاء اخذ و ان شاء ترک و ان باعه ولم يوذن به فهو احق به رواه مسلم و ابوداود والنسائي (عيني شرح كنز جلد دوم صفحه ۲۳۷) *

(2) عن جابر يقول قال رسول الله صلی الله عليه و سلم الشفعة في كل شرک في ارض او ربع اوحائط لايصلح ان يبيع حتی يعرض علی شريكه فياخذ اويدعه فان ابی فشريكه احق به حتی يوذنه (مسلم جلد ۲ صفحه ۳۲) *

in the interpretation of these two traditions. The difference of phraseology which I have already indicated, enabled them to put such an interpretation as would render the traditions consistent with the rule that the absence of the pre-emptor's consent does not vitiate the sale—the rule which had been unanimously adopted by the jurists. This is best shown by *Naiwawi*, a celebrated commentary on *Muslim*, in which these traditions occur. The author explains the traditions in the following manner :—The saying of the Prophet to the effect that it is not for him (the vendor) to sell until he has apprised his co-parcener is, in the opinion of our doctors, taken to refer to the *moral* propriety of giving notice and to the objectionableness of sale before such notice—an objectionableness which arises from impropriety. It does not, however, mean that such sale is " *absolutely prohibited*," and this is the manner in which they have interpreted the *Hadis* (sayings of the Prophet), because it may be rightly affirmed of that which is morally objectionable, that it is not lawful, and thus the expression " lawful " comes to mean permissible, which implies that both sides (positive and negative) are on an equal footing, whilst that which is '*morally objectionable*' cannot be said to be permissible, both sides of which are equal, but, on the contrary, the '*morally objectionable*' is that the rejection of which prevails (over its adoption)" (1).

It is not necessary to pursue any further the syllogistic manner in which such questions were dealt with by Muhammadan jurists. I may, however, say that the ultimate reason which prevented them from interpreting these traditions in the sense of creating a *legal* obligation imposed upon the vendor was, that the language of the tradition being capable of two interpretations, they adopted the more lenient one, acting upon the presumption that a *legal* obligation does not exist till expressly provided, and

(1) و اما قوله صلى الله عليه وسلم فليس له ان يبيع حتى يوذن شريكه فهو محمول عند اصحابنا على الندب الى اعلامه و كراهية بيعه قبل اعلامه كراهة تنزيه و ليس بحرام و يتاولون الحديث على هذا اذ يصدق على المكروه انه ليس بحلال و يكون الحلال بمعني المباح وهو مستوى الطرفين والمكروه ليس بمباح مستوى الطرفين بل هو راجح الترك (نووي شرح مسلم جلد ٢ صفحه ٣٢) *

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that all contracts are lawful unless expressly prohibited by law. The law, therefore, as it stands, does not oblige the vendor to give notice of the projected sale to the pre-emptor, nor does it vitiate a sale executed without his permission. I am not at liberty to interpret the sayings of the Prophet in a sense other than that adopted by the recognized authorities on Muhammadan jurisprudence. But it is perfectly clear from these traditions that the very conception of pre-emption in Muhammadan Law necessarily involves the existence of the right before the sale in respect of which it may be exercised. All that the interpretation of the Muhammadan jurists goes to show is, that the sale is not vitiated by the absence of the pre-emptor's consent—an interpretation which, whilst it is perfectly consistent with the rest of their method of reasoning in dealing with pre-emption, again falls short of establishing the proposition that the *right* is not *antecedent* in existence to the sale complained of by the pre-emptors.

I have now to deal with the argument that the right of pre-emption under the Muhammadan Law is "*a mere right of re-purchase*, not from the *vendor*, but from the *vendee*." I trust what I have already said goes far to show that this conclusion cannot be right. If by the expression "re-purchase" is meant the institution of a new contract of sale other than that entered into by the vendor and the vendee, the hypothesis becomes obviously erroneous, because the entire argument, that the vendor of a pre-emptional tenement conveys an *absolute* ownership to the vendee unhampered by any defect of title arising out of pre-emption, applies as much to a Muhammadan as to a Hindu vendee. And if the right of pre-emption is only a right of re-purchase, and if the right is to be enforced, *not as a rule of law*, but only by reason of the rule of justice, equity, and good conscience, I fail to see, even in a case where all the parties are Muhammadans, where the equity lies in forcing a man to sell that which is *absolutely* his own to a man who had no right in connection with it at the time when the title of the *vendee* was created. Equity is higher than the considerations of race and creed, nor will it allow parties to impose upon each other rules not sanctioned by the *law*. And if its rules prohibit a Hindu purchaser from being deprived of property of which he is the absolute owner, that same rule should, by ordinary legal analogy, benefit also a Muhammadan purchaser

of property whose title is, *ex hypothesi*, as *absolute* and as free from defect as that of the Hindu vendee. Further, if pre-emption is only a right of "*re-purchase*" from the vendee who, *ex hypothesi*, has, under the sale, derived an *absolute* title, unhampered by the pre-emptive right, there is no reason which would prevent the vendee from insisting that the terms of the new sale should be other than those under which he himself purchased. That this would be the necessary consequence of the hypothesis, seems to me to be as clear as the proposition that every *absolute* owner is at full liberty to sell or not to sell his property, and that if he chooses to sell it, he can make his own terms as to the bargain of sale. That such a result is not only not warranted by the Muhammadan Law of pre-emption, but would positively strike at the very root of the right itself, seems to me to be too obvious to require any explanation. But the Muhammadan Law of pre-emption involves no such anomalous inconsistencies of reasoning, because the right of pre-emption is not a right of "*re-purchase*" either from the *vendor* or from the *vendee*, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place. Otherwise, because every sale of a pre-emptional tenement renders the right of pre-emption enforceable in respect thereto, every successful pre-emptor obtaining possession of the property, by the so-called "*re-purchase*" from the vendee, would be subject to another pre-emptive claim, dating, not from the original sale, but from such "*re-purchase*"—a state of things most easily conceivable where the new claimant is a pre-emptor of a higher degree than the pre-emptor who has already succeeded. The result would be that pre-emptive litigation could never end.

I could go on at much greater length to show that the hypothesis that pre-emption is only "a right of *re-purchase* from the vendee," would involve even greater anomalies inconsistent with the fundamental rules of the right of pre-emption. But I need not pursue the argument any further, because it seems to me

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that the general principles of jurisprudence suggest the same conclusions as those at which I have arrived. I take it as a fundamental principle that no state of things can give rise to cause of action, such as can be sued upon in a Court of justice, unless there is a right and an infringement of that right—the right being *necessarily antecedent* to the injury. My conceptions of jurisprudence prevent me from conceiving any kind of right of which both the *inception* and the *infringement* depend upon one and the same incident. And it would be absurd to conceive a right of which the infringement takes place *before* the *inception* of the right itself. And if I am right so far, how would the right of pre-emption stand these tests, if it be taken not to exist before the sale in respect of which it is to be exercised? The *injury* to the right is the *intrusion* of a stranger under a sale, and the whole *object* of the right is to prevent such intrusion. And how could such intrusion be legally prevented if the right did not exist before the intrusion? Similar difficulties will arise if it be assumed that the point of the inception of the pre-emptive right is not *sale*, but "*talab*," that is, demand of pre-emption by the pre-emptor. There can be no legal demand of a right which does not exist, nor could refusal by the vendee to surrender the pre-emptional property constitute any legal injury where no legal right existed.

But apart from the reasoning suggested by the analogy of jurisprudential conceptions, it seems to me that, if it is once conceded that the sole object of the pre-emptive right is to prevent the intrusion of strangers objectionable to the pre-emptor, it follows, I should say as a matter of "common sense," that if a Muhammadan pre-emptor can by the exercise of his pre-emptive right prevent the intrusion of another Muhammadan, he should, *á fortiori*, be able to do so in the case of a purchaser who belongs to a different race and creed, for, *cæteris paribus*, it may be taken that a non-Muhammadan purchaser under such conditions would be more objectionable to the Muhammadan pre-emptor, and would demand a more strenuous exercise of the pre-emptive right.

Besides these arguments there is much on the subject of conflict of laws in the judgments delivered by Norman and Macpherson, JJ., in *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (1), which

(1) 4 B. L. R., 134.

I might adopt in support of my view. But it is unnecessary to repeat the arguments which those learned Judges have already expressed with such force and lucidity. It, however, remains for me to deal with the reasoning adopted by Mitter, J., as to pre-emption being a right "feeble and defective," because, on the one hand, it is lost if not immediately asserted, and, on the other hand, it can be defeated by "tricks and artifices." If "*feeble and defective*" only means that the right of pre-emptor is *transitory* in the sense of requiring immediate assertion, I can understand the phrase. But I do not understand how the transitory character of the right can affect the question whether or not it should be enforced against a Muhammadan vendee and not against a non-Muhammadan. So far as this particular point is concerned, it seems enough to say that, if the right is legally enforceable against the one, it should be enforceable against the other. On the other hand, in one sense, full ownership itself may be called transitory, because if *A*, being the owner of *X*, allows *B* to sell it to *C*, *A* being present at the time of the sale, his mission to assert his title to *X* would, in effect, by the doctrine of estoppel, defeat his right in *X*. Pre-emption is feeble in a sense not dissimilar in principle to the illustration which I have given. The object of the Muhammadan Law in rendering the immediate demand of pre-emption a condition precedent to the exercise of the right, is to render it obligatory upon the pre-emptor to give the earliest possible notice to the vendee not to rely upon his purchase for making improvements, &c., or otherwise dealing with the purchased property. The rule is a very salutary restriction of right, which might otherwise be very capriciously enforced under a system of law which recognized no rule as to the limitation period for enforcing claims. Indeed, the rule rests much upon the same considerations as the doctrine of "*notice*" and the principle of acquiescence amounting to estoppel in equity jurisprudence. But such restrictions do not derogate from the right of pre-emption any more than another equitable rule of the same right, that the pre-emptor, in enforcing his right, cannot break up the bargain of sale by pre-empting only a portion of the property sold to one purchaser. The law of pre-emption is full of equitable considerations of this nature, but it is scarcely necessary to pursue the argument any further.

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This brings me to the last point. Considerable portions of the judgments in *Sheikh Kudratulla's* case are devoted to showing that the right of pre-emption can be defeated by what Mitter, J., calls "tricks and artifices," which Peacock, C. J., held are recognized and allowed by Muhammadan Law; and from this it is inferred (though I confess, with due respect, I am not able to follow the reasoning) that the right is not enforceable against a Hindu purchaser, though enforceable against a Muhammadan If any question of the "tricks and artifices" referred to were involved in this case, I should have a good deal to say on the subject, but here I need only say once more that in dealing with questions of Muhammadan Law, the distinction between moral behests and legal duties on the one hand, and between rules of substantive law and procedure on the other, must always be borne in mind. And I think I may safely say that most if not all the notions about the efficacy of these "tricks and devices" arise from overlooking these distinctions. Peacock, C. J., says (p. 173) :—"The Muhammadan Law, as has been already shown by Mr. Justice Kemp and Mr. Justice Mitter, admits of all kinds of devices for the purpose of frustrating its own law. If there is a *bonâ fide* sale between a Muhammadan vendor and a Hindu purchaser, and they come forward and declare that which is not true, and say that it was not a sale intended to operate, but was a fictitious device, their words must be accepted according to the Muhammadan Law, and the truth of the assertion cannot be disputed. They would be bound by the untruth which the vendor and the purchaser declare for the purpose of evading the right of pre-emption. Can we say that if they will state an untruth, the Hindu shall remain in possession of the property which he has purchased; but if they will not declare that which is untrue, there is an equity to take the property away from the purchaser." The argument is consistent with certain passages in the text-books, which his Lordship went on to cite. But without attempting to explain the real reasons upon which those passages proceed, the argument may be fully answered by saying that in the case supposed, the question whether there has been a *bonâ fide* sale or not is not a question of substantive law, but a mere question of fact, to be ascertained by the rules of that department of procedure which consists

of the rules of evidence; and that we are no more bound to follow the Muhammadan law of evidence in a pre-emptive suit than in a suit involving questions of succession or inheritance. The Muhammadan law of evidence, like other old systems, contains numerous rules which arose either from imperfect notions as to the distinction between the *weight* and *admissibility* of evidence, or from the rules of procedure, or from the political exigencies of the Muhammadan people, when those rules were formulated. The rule whether upon any particular point in a pre-emptive suit the statement of the pre-emptor, the vendor or the vendee is to be believed, is an illustration of the former part of this proposition, and the latter part may be exemplified by the disability imposed upon non-Muhammadans to give evidence agains a Muhammadan in a Court of Justice, the reason being stated to be "that they have no power or authority over the Moslems, and are suspected of inventing falsehoods against them." But the Muhammadan law of evidence is not the law of British India, and, whatever force the argument of Peacock, C. J., might have had in 1869, when his judgment was delivered, it can have no application now. For if it was intended as an enunciation of the Muhammadan law of evidence, since that time a Code of Evidence has been passed providing its own rules for ascertaining facts, and s. 2 of the enactment (Act I of 1872) has abolished all other rules of evidence. Similarly, it will be found upon close examination of the other devices to defeat pre-emption, referred to in the *Hedaya* and in Bailie's *Digest*, on which the learned Judges of the Calcutta Court relied, that they owe their origin to extremely technical rules of the Muhammadan Law of contract, procedure or evidence, in none of which departments of law are we bound by these technicalities. The Muhammadan substantive law, in matters governed by it, cannot, of course, be administered without ascertaining the facts to which it is to be applied. But how those facts are to be ascertained, is a matter relating to the remedy, *ad litis ordinationem*, for which the Courts in British India have their own rules. And there is in principle no more reason for saying that in a pre-emptive suit the questions, whether a valid *bonâ fide* sale has taken place or not, and if so, for what price, are governed by the Muhammadan Law, than there would be for saying that when a

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decree is passed under the Muhammadan Law for dower or inheritance, the process for executing that decree is to be regulated by the rules of procedure provided by that law. And, speaking generally, I may say that if it is once conceded that the technicalities of the Muhammadan Law of contract, procedure or evidence are not binding upon us, it will be found that no "tricks and artifices" can defeat the pre-emptive right in our Courts. Such devices are held to be "*abominable*" even where the technicalities of Muhammadan adjective law might give them some plausible effect; and this is the prevalent doctrine, notwithstanding the opinion of Kazi Abu Yusuf, to be found in the passage from the *Hedaya*, to which Kemp, J., has referred. The opinion of Imam Muhammad, given in that same passage, condems all devices; but there being no such questions in this case, I need not discuss the matter any further. But I wish to add that I have considered it my duty to deal with this reference at such elaborate length, not only out of respect for the eminent authorities with whom I have ventured to differ in arriving at my conclusions, but also because the rapid rise in the value of landed property in British India has gone far to extend the exercise of the pre-emptive right and to enhance its importance by confirming it as an incident of the proprietary tenure. Moreover, the right, though it no doubt operates as a restriction of the principle of free sale, and thus tends to diminish the market-value of property, must have enough to recommend itself, for even in some of the most civilized parts of Germany, a similar right (*retractrecht*) is still maintained, either as a custom or as a rule of law. And if such is the case in a country where distinctions of race, caste, or creed do not prevail, it seems to me that the right must not be lightly dealt with in a country like India, where the population presents quite the opposite state of things, and where the intrusion of a stranger as a co-sharer must not only give rise to inconvenience, but disturb domestic comfort, if not, as in some cases, lead to breach of the public peace.

My answer to this reference is in the affirmative.

OLDFIELD, J.—The answer should be in the affirmative. concur in the opinion expressed in the case in *Chundo* v. *Hakeem*

Alim-ood-deen (1), by the majority of this Court, that by the provisions of s. 24, Act VI of 1871, the Court is not bound to administer the Muhammadan Law in claims of pre-emption, but on grounds of equity that law has always been held to bind Muhammadans, and has always been administered as between them in claims for pre-emption. Muhammadans therefore, as between themselves, hold property subject to the rules of Muhammadan Law; and it would not be equitable that persons who are not Muhammadans, but who have dealt with Muhammadans, in respect of property, knowing perfectly well the conditions and obligations under which the property is held, should, merely by reason that they are not themselves subject to Muhammadan Law, be permitted to evade those conditions and obligations. I wish to add that although I was a party to *Moti Chand* v. *Mahomed Hossein Khan* (2), my decision followed the Full Bench ruling in *Chundo* v. *Hakeem Alim-ood-deen* (1) by which I felt myself bound.

BRODHURST, J., concurred.

PETHERAM, C. J.—My answer to the question referred to the Full Bench is in the affirmative. There appears to be no doubt as to what the rule of Muhammadan Law is. It imposes an obligation upon a Muhammadan owner of property, in the neighbourhood of which other Muhammadans have property, or in respect of which other Muhammadans have a share, to offer it to his neighbours or his partners before he can sell it to a stranger. This is an incident of his property, as the text-books of the Muhammadan Law show, and, for the reasons stated by my brother Oldfield, I think that it is equitable to apply the rule to cases like the present, in which the purchaser is a Hindu.

DUTHOIT, J, concurred.

CIVIL JURISDICTION.

1885 *May* 13.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RAMPHUL (PLAINTIFF) *v.* DURGA AND OTHERS (DEFENDANTS).*

Civil Procedure Code, s. 617—High Court, reference to—"Final" decree or order.

A Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, made an order returning the plaint for presentation to the proper

* Reference No. 79 of 1885, under s 617 of the Civil Procedure Code, by C. Donovan, Esq Offg. District Judge of Benares, on the 23rd March, 1885.

(1) N.-W. P. H. C. Rep., 1874, p. 28. (2) N.-W. P. H. C. Rep., 1875, p. 147.

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Court. An appeal was preferred under s. 588 of the Civil Procedure Code, to the District Judge, who, entertaining doubts upon the question of jurisdiction, referred the matter to the High Court, under s 617.

Held that, inasmuch as the order of the Munsif was not a final decree in the suit, and any order of the Judge in appeal disposing of the plea of jurisdiction would not amount to a "*final*" decree within the meaning of s. 617 of the Civil Procedure Code, the High Court had not jurisdiction to entertain the reference.

THE facts of this case are sufficiently stated for the purposes of this report, in the judgment of Straight, J.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the plaintiff.

Munshi *Kashi Prasad*, for the defendants.

STRAIGHT, J.—This is a reference by the Judge of Benares, made under the following circumstances :—

A suit was instituted in the Court of the Munsif of Benares. It is not necessary to describe in detail the nature of the suit, but it is sufficient to say that it related to immoveable property. Upon the statement of the plaintiff's case, as disclosed in the plaint, the Munsif was of opinion that he had no jurisdiction to entertain the suit, and he made an order returning the plaint for presentation to the proper Court.

Under the Statute, that order of the Munsif was not a decree, but was an order appealable as an order under s. 588, Civil Procedure Code ; and under that section an appeal was preferred to the Judge. The Judge, entertaining doubts upon the question of jurisdiction, has made the reference now before us under s. 617 of the Code.

This Court has jurisdiction to entertain the reference only when there is a suit or appeal before the Court making the reference in which the decree or order by the Court entertaining it is final.

In this case the order of the Munsif was not a final decree in the suit ; nor would any order of the Judge in appeal passed at the present stage, disposing of the plea of jurisdiction, amount to a *final* decree within the meaning of s. 617, Civil Procedure Code. In other words, there would be no decree. Whether the Judge reversed or upheld the Munsif, a final decree could only be passed

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by the Court subsequently disposing of the suit upon the merits, and the decision of such Court would not only be open to appeal to the Judge, but to a second appeal to this Court.

Under these circumstances, I do not think that the case falls within s. 617 of the Code, and the record must be returned to the Judge, and he must dispose of the appeal as to him seems fit. Any costs that may have been incurred by the parties owing to this reference will abide the result of the cause.

BRODHURST, J.—I concur.

APPELLATE CIVIL.

1885 *May* 16.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

IMDAD ALI KHAN (OPPOSITE PARTY) *v.* THE COLLECTOR OF FARAKHABAD (APPLICANT)*.

Act X of 1870 (*Land Acquisition Act*), *s.* 15—*Reference by Collector to District Court—Land claimed by Collector on behalf of Government or Municipality.*

The scope and object of the Land Acquisition Act (X of 1870) is to provide a speedy method for deciding the amount of the compensation payable by the Collector, when such amount is disputed, and the person or persons to whom it is payable.

S. 15 of the Land Acquisition Act comtemplates a reference when the question of the title to the land arises between the claimants who appear in response to the notice issued under s. 9, and who set up conflicting claims one against another as to the land required, which the District Judge as between such persons can determine.

The Collector has no power to make a reference to the District Judge under s. 15 in cases in which he claims the land in question on behalf of Government or the Municipality and denies the title of other claimants, and the District Judge has no jurisdiction to entertain or determine such reference.

THE facts of this case are sufficiently stated for the purposes of this report, in the judgment of Straight, J.

Mr. *Amir-ud-din*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

STRAIGHT, J.—This is an appeal from a decision of the Judge of Farakhabad, dated the 15th August, 1884, and by way of precau-

* First Appeal No. 168 of 1884, from an order of C. J. Daniell, Esq., District Judge of Farakhabad, dated the 23rd August, 1884.

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tion, a petition for revision was also filed by the appellant. The order impeached professes to have been passed under the provisions of the Land Acquisition Act of 1870.

Now, I find that the Judge, at the commencement of the judgment, observes as follows:—

"This claim is contested by three persons, the Collector, representing the Municipality of Farakhabad, Brindaban, and Chotey Khan. It is a claim to a strip of land, seven biswas in area, lying immediately with the jesmai gate of the city, next to a plot of land No. 1793, which is said to be owned by Chotey Khan."

I gather from this passage in the Judge's decision that he regarded the matter much in the light of a civil suit for land in which three different parties were asserting a title to such land, and this question of title to the property was what he had to determine.

The first plea which has been raised before us is, that the Judge had no jurisdiction to take cognizance of such a dispute on a reference from the Collector of Farakhabad under the Land Acqusition Act, as no such reference could properly be made, when the Collector himself claimed the land as belonging to Government. I think that this plea is a sound one, and must prevail. The action of the Collector in making this reference was apparently founded upon a misapprehension of the object and intention of the Land Acquisition Act of 1870, which contemplate the provisions of a summary method of determining the compensation to be paid for land required for certain defined purposes, and the Act points out the mode in which the same is to be acquired, and the formalities necessary.

By s. 15 it is enacted that, if upon inquiry before the Collector, any question respecting the title to the land, or any rights thereto, or interests thereon, *arise between or among* two or more persons making conflicting claims in respect thereof, the Collector is authorized to refer the matter to the determination of the Judge.

This section clearly contemplates a reference when the question of the title to the land arises between the claimants who appear in

response to the notice issued under s. 9 of the Act, and who set up conflicting claims one against another as to the land required, which the District Judge as between such persons can determine. The scope and object of the Act as I have already observed, was to provide a speedy method for deciding the amount of the compensation payable by the Collector, when such amount is disputed, and the person or persons to whom it is payable.

The special jurisdiction of the Judge for this purpose is intelligible enough; but I do not think it was ever intended to be extended to a case in which the Collector claims the land on behalf of the Government or the Municipality, and denies the title of other claimants to the land. Such a position would be inconsistent with the applicability of the Act, for it denies the right of any person to compensation. It seems a contradiction in terms to speak of the Collector as seeking acquisition of land, when he asserts that the land is his own, and that no other person has any interest in it.

The Judge has treated this case as one between three persons making conflicting claims to the land, and he has determined that it belongs to the Collector. In other words, he has, under colour of the Land Acquisition Act, tried a triangular civil suit for declaration of proprietary title to land; and in my opinion he had no authority whatever to do so. Looking to all the circumstances of the case, it is clear to my mind that the Collector had no power to make the reference, and consequently the Judge had no jurisdiction to entertain and determine it. The proceedings of the Judge being without jurisdiction, we have no other alternative but to decree the appeal with costs, and set them and his order aside.

BRODHURST, J.—For the reasons recorded by my brother Straight, I am of opinion that the proceedings of the Judge are without jurisdiction, and must be set aside, and the appeal decreed with costs.

Appeal allowed.

1885
June 1.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

GURDIAL MAL (PLAINTIFF) *v.* JAUHRI MAL AND OTHERS (DEFENDANTS)*.

Mortgage—Agreement, for fresh consideration, between mortgagee and third person for release of property from mortgage—Release not required to be in writing and registered.

The mortgagee of immoveable property under a hypothecation bond, entered into an agreement with one who was not a party to his mortgage, to release part of the property from liability under his mortgage. This agreement was not in writing and registered. The mortgagee subsequently sought to enforce the hypothecation against the whole of the mortgaged property.

Held that the agreement, being a new contract for a fresh consideration between persons who were not parties to the mortgage, was not, as between the parties to the mortgage, a release which the law required to be in writing and registered.

Held also that the party to the agreement with the mortgagee might have come into Court as a plaintiff to enforce the same, and that it was equally competent for him to plead it in avoidance of the mortgagee's claim to bring to sale the property referred to therein. *Nash* v. *Armstrong* (1), referred to.

THE plaintiff in this case, Gurdial Mal, sued for the recovery of a sum of money, principal and interest, due on a hypothecation bond executed in his favour by defendants Nos. 1 to 6, by enforcement of lien against the mortgaged property. This property comprised, among other things, a ten biswas share in a village called Etawa, an eight biswas share in a village called Muzaffarpur Kaisho, and a mango grove in the town of Bijnour. The plaintiff alleged that, subsequent to the execution of his bond, the shares and the grove before-mentioned were mortgaged to the defendants Nos. 7 and 8; that in 1873 these defendants paid him the sum of Rs 700 on account of his bond; that, without his knowledge, they made an indorsement in Persian upon the bond, to the effect that Rs. 709 had been paid in consideration of the release of the share in Muzaffarpur Kaisho and of the grove from the charge held by him thereon; that, in consequence of his ignorance of Persian, he did not, till 1883, become aware of the real character of the indorsement; and that he had made no release of the property as alleged. The allegations of defendants Nos. 1 to 6 are not material to the purposes of this report. The defendant No. 7, Jauhri Mal, alleged that he had purchased the share in Etawa in satisfaction of a lien which was prior to that of the plaintiff; that the share

* First Appeal No. 47 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 26th January, 1884.

(1) 30 L. J., C. P. 286.

in Muzaffarpur Kaisho and the grove in Bijnor were mortgaged to him in 1873, on the condition that he should pay Rs. 700 to the plaintiff in order to exempt such property from the plaintiff's mortgage; that, in consideration of such payment, the said property had been released by the plaintiff; and that the indorsement by which this release had been effected was genuine, and was made by the plaintiff himself. The indorsement was in the following terms :—" Received on account of the release of an eight biswa share in Muzaffarpur Kaisho in pargana Bijnor, and a mango grove in the town of Bijnor, (the amount) through Jauhri Mal, purchaser of the aforesaid property." The defendant No. 8, Pertab Singh, alleged that he had purchased a share in Muzaffarpur Kaisho at a date prior to that of the plaintiff's bond, and that this share was therefore not subject to the plaintiff's lien.

The Court of first instance (Subordinate Judge of Moradabad) found that the truth of the allegations of the defendant Jauhri Mal was established by the evidence; and accordingly, while decreeing the claim as against the defendants Nos. 1 to 6, exempted from the decree the shares in Etawa and Muzaffarpur Kaisho and the grove in Bijnor.

The plaintiff appealed to the High Court, contending, *inter alia*, that " under the provisions of the Stamp and Registration Acts, the indorsement on the back of the bond, which is the basis of the suit, is invalid, and cannot operate to release any property from the lien created by the bond."

Pandits *Ajudhia Nath* and *Bishambar Nath*, for the appellant.

Babus *Dwarka Nath Banarji* and *Ratan Chand*, for the respondents.

STRAIGHT and TYRRELL, JJ.—In this appeal there are only two questions before us. The first of these relates to the village of Etawa. With regard to this village, we concur with the findings of the Subordinate Judge, and approve the views expressed by him. Upon the remaining question, we are first of all of opinion that the evidence satisfactorily proves that Jauhri Mal paid the Rs. 700 to the plaintiff on the 6th March, 1883, upon the faith of the plaintiff's promise that he would release the share of Muzaffarpur Kaisho from the mortgage held by him, and we entirely disbelieve the

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plaintiff's assertion that, though the deed was all along in his possession, he never discovered the indorsement on it till the 8th February, 1883, a period of about ten years. The case, therefore, so far as the defendants Jauhri Mal and Pertab Singh are concerned, comes to this—that in consideration of the plaintiff's promise to release a particular property from a charge he already held on it, Jauhri Mal paid Rs. 700 to the plaintiff. This was a new contract for a fresh consideration between persons who were not parties to the mortgage, and was not, as between the parties to the mortgage, a release which the law required to be in writing and registered. In short, it was a fresh oral agreement for a distinct and separate consideration *dehors* the original contract. We think that Jauhri Mal might have come into Court as a plaintiff to enforce that agreement, and that it is equally competent for him to plead it in avoidance of the plaintiff's claim to bring Muzaffarpur Kaisho to sale. The principle enunciated in *Nash* v. *Armstrong* (1) is applicable *a fortiori* to the present case, in which a stranger to the original contract is setting up, as a consideration for money paid by him, a promise of one of the parties not to enforce a particular covenant of such contract.

In this view of the case, it is not necessary for us to decide the objection taken by the learned counsel for Pertab Singh.

The appeal fails, and we dismiss it with costs.

Appeal dismissed.

FULL BENCH.

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Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr Justice Mahmood.

JAFRI BEGAM (DEFENDANT) *v.* AMIR MUHAMMAD KHAN (PLAINTIFF).*

Muhammadan Law—Inheritance—Devolution not suspended till payment of deceased ancestor's debts—Decree in respect of deceased Muhammadan's debts passed against heir in possession of estate—Decree not binding on other heirs not parties thereto and not in possession, so as to convey their interests to auction-purchaser in execution—Recovery of possession by other heirs contingent on payment of proportionate shares of debt for which decree was passed.

Upon the death of a Muhammadan intestate, who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such

* First Appeal No 70 of 1883, from a decree of Pandit Rai Jagat Narain, Subordinate Judge of Farakhabad, dated the 19th March, 1883.

(1) 30 L. J., C. P. 286.

estate devolves immediately on his heirs, and such devolution is not contingent upon, and suspended till, payment of such debts.

A decree relative to his debts, passed in a contentious or non contentious suit against only such heirs of a deceased Muhammadan debtor as are in possession of the whole or part of his estate, does not bind the other heirs who, by reason of absence or other cause, are out of possession, so as to convey to the auction-purchaser, in execution of such a decree, the rights and interests of such heirs as were not parties to the decree.

In execution of a decree for a debt due by a Muhammadan intestate, which was passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree holder put up for sale and purchased certain property which formed part of the said estate. One of the heirs, who was out of possession, and who was not a party to these proceedings, brought a suit against the decree holder for recovery of a share of the property sold in execution of the decree, by right of inheritance.

Held by the Full Bench that the plaintiff was not entitled to recover from the auction purchaser in execution of the decree possession of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debt for which the decree was passed, and in satisfaction whereof the sale took place.

Wahidunnissa v. *Sheobrattun* (1), *Assamathem Nessa Bibi* v. *Roy Lutchmeeput Singh* (2), *Mazhar Ali* v. *Budh Singh* (3), *Bachman* v. *Bachman* (4), *Hamir Singh* v. *Musammat Zakia* (5), and *Muttyjan* v. *Ahmed Ally* (6), referred to by MAHMOOD, J.

The facts of this case were as follows :—One Ali Muhammad Khan died in 1878, leaving as his heirs his parents, a widow named Wirasat Begam, two sons named Ali Ahmad and Abdul Majid, three daughters named Banarsi Begam, Niyaz Begam, and Jafri Begam, and a brother, Amir Muhammad Khan.

On the 8th December, 1879, Abdul Rahman, the husband of Jafri Begam, obtained against Wirasat Begam, Ali Ahmad, Abdul Majid, and the three daughters, as heirs of the deceased and in possession of his estate, a decree for a debt due by the deceased. In execution of this decree, ten biswas of a village called Bakhtiarapur, forming part of the estate of the deceased, were put up for sale, and were purchased by Abdul Rahman.

In 1882, Amir Muhammad Khan, brother of the deceased, brought the present suit against the widow, the sons, and the daughters of the deceased, to recover thirty-five out of 168 sehams into which the estate of the deceased was divisible. He claimed these

(1) 6 B. L. R., 54.
(2) I. L. R. 4 Calc. 142
(3) *Ante*, p. 297.
(4) I. L. R., 6 All 583.
(5) I. L. R., 1 All. 57.
(6) I. L. R., 8 Calc. 370.

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thirty-five sehams upon the following grounds. He alleged that, about a month after the death of Ali Muhammad Khan, his mother, Panna Bibi, died, and of the twenty-eight sehams she inherited from her son, seven went to her husband, Ghulam Muhammad, and twenty-one to him, the plaintiff, and that his father Ghulam Muhammad died about three months before the suit was brought; and the twenty-eight sehams he inherited from his son Ali Muhammad Khan, and the seven sehams which he inherited from his wife, or thirty-five sehams in all, descended to him, the plaintiff. In the property in suit was included the village of Bakhtiarapur. With reference to this village, the defendant Jafri Begam contended, as the legal representative of her husband, that, under the circumstances stated above, the plaintiff was not entitled to share in it. The eleventh issue in the case related to this point, and was as follows :—

"Is the plaintiff entitled to share in ten biswas of mauza Bakhtiarapur, held by defendant No. 6 (Jafri Begam) as legal representative of her husband Abdul Rahman, the auction-purchaser?"

Upon this issue the lower Court held as follows :—"As it is not denied that the whole of Bakhtiarapur formed part of the estate of Ali Muhammad Khan, deceased, the plaintiff cannot, by the mere fact of ten biswas of that estate being sold in execution of Abdul Rahman's decree, to which he was no party, be debarred from obtaining his legal share. See *Luchmeeput Singh* v. *Sita Nath Doss* (1)."

The defendant, Jafri Begam, appealed to the High Court. The following contentions were raised on her behalf :—

"When the appellant's vendor purchased the property in satisfaction of the debt due by the ancestor and in execution of a decree duly obtained against all the heirs in possession of the estate, such property can no longer be claimed by the plaintiff, especially as he did not prefer any objection in the course of the suit, notwithstanding that he had full knowledge of the same.

"The ruling quoted by the lower Court is not applicable to the case of the appellants.

(1) I. L. R., 8 Calc. 477.

"Assuming the decree to be correct, it should have ordered payment of the proportionate debt by the respondent before awarding possession."

The case came on for hearing before STRAIGHT and MAHMOOD, JJ., who referred the following questions to the Full Bench:—

"(1). Upon the death of a Muhammadan intestate, who leaves unpaid debts, whether large or small, with reference to the value of his estate, does the ownership of such estate devolve immediately on his heirs, or is such devolution contingent upon, and suspended till, payment of such debts?

"(2). Does a decree, relative to his debts, passed in a contentious or non-contentious suit against only such heirs of a deceased Muhammadan debtor as are in possession of the whole or part of his estate, bind the other heirs who, by reason of absence or other cause, are out of possession, so as to convey to the auction-purchaser, in execution of such a decree, the rights and interests even of such heirs as were no parties to the decree?

"(3). If not, can such heirs as were no parties to the decree recover from the auction-purchaser in execution of such decree, possession of their shares in the property sold, without such recovery of possession being rendered contingent upon payment by them of their proportionate shares of the ancestor's debts for which the decree was passed, and in satisfaction whereof the sale took place?"

This last question was amended by the Full Bench to read as follows:—"If not, is the plaintiff in this case entitled to recover from the auction-purchaser in execution of such decree possession of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debts for which the decree was passed, and in satisfaction whereof the sale took place?"

Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Harkishan Das*, for the respondent.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J., STRAIGHT, OLDFIELD, and BRODHURST, JJ.—Our answer to the first question referred to us in this case

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is in the affirmative, to the second question in the negative, and to the third question (as amended) also in the negative.

MAHMOOD, J.—In this case I agree generally in the answers given by the learned Chief Justice and my learned brethren to the three questions referred to the Full Bench; but I do not intend on this occasion to state the grounds upon which my conclusions are based. One reason why I refrain from doing so is, that one of the greatest difficulties in the way of the Courts established in British India, is the paucity of text-books upon Muhammadan Law written in English which are sufficiently accurate to be safe guides in the administration of those branches of that law which, by s. 24 of the Bengal Civil Courts Act (VI of 1871) we are bound to administer. The only means of information consists of books of reference which are either incomprehensive compilations or abbreviated translations, and, in some cases, translations of translations. Another difficulty is that the language of the highest Courts in India is not the language of the people, and consequently the vast majority of advocates who appear in those Courts are those who must speak English, and who, as a matter of fact, are not likely to refer to the original Arabic authorities. For these reasons, I confess, I fully expected that the judgment of the Court would have been reserved in such a case.

As the learned Chief Justice rightly observed during the argument, there is "no magic in Muhammadan Law." There is, of course, no magic in that system any more than in any other. The Muhammadan Law is only a part of the general system of jurisprudence, and whatever is true as a matter of general principle would be true of any particular legal system, worthy of the name, so long as its rules are accurately ascertained.

My difficulty in the present case does not arise from anything intrinsically abstruse in the three questions referred to the Full Bench, but from the fact that some of the highest tribunals in India have repeatedly expressed views upon the subject which, according to the conclusions arrived at by us to-day, directly contradict some of the principles of Muhammadan jurisprudence. I make this observation with due respect, and do so because it was for this reason only that my brother Straight and I made

the reference. Speaking for myself, I should not otherwise have thought it necessary to refer the case to the Full Bench. And this being so, I should be sorry if anything said by me in this case merely added one more to the rulings to be found in the Reports; and I reserve the grounds of my conclusion, in the hope that I may, perhaps, be able to make my judgment of such a nature as might, in some measure, help to remove what I may respectfully call the existing cloud of judicial exposition upon these important questions. For this reason, I should have been glad to hear in the argument at the Bar some reference to the Arabic texts of the Muhammadan Law; but under the circumstances, and considering that the learned Chief Justice and my learned brethren have been anxious to deliver their judgments at once, the only course open to me is, that I must search out these texts for myself, and as that will require some time, I must, of necessity, reserve the reasons of my judgment till such time as the exigencies of the business of the Court allow.

[On the 14th March, the following judgment was delivered by Mahmood, J., on the question referred to the Full Bench]

MAHMOOD, J.—When this case was argued before the Full Bench, I mentioned the reasons why I did not on that occasion set forth the exact grounds upon which I concurred in the conclusion at which the learned Chief Justice and the rest of the Court had arrived. I was anxious, as I said then, to support my conclusions by citing original authorities of Muhammadan Law—a course which I considered especially necessary in view of the long conflict of decisions which exists in the Reports upon the subject to which this reference relates. The exigencies of the business of the Court have not allowed me, before now, to consult the original authorities of the Muhammadan Law to which I wished to refer, and it has therefore devolved upon me to deliver my judgment now, although the rest of the Bench have already delivered their judgments.

Before, however, citing the original authorities of the Muhammadan Law, I wish to consider briefly the various rulings to be found in the Reports, and which constitute the case-law upon the subject. I shall, in dealing with this part of the judgment,

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refer only to the most important cases which have been cited, as in the order of reference I have already summarised nearly all the cases.

The first question referred to us does not appear to have arisen simply and directly in any case to be found in the Reports, though it formed a necessary step of the *ratio decidendi* of some of the rulings which have been cited, and in this sense it was discussed and decided. Under this class of cases, the first authorities to which I wish to refer are the case of *Wahidunnissa* v. *Shubrattun* (1), and another case very similar in principle, namely, *Bazayet Hossein* v. *Dooli Chund* (2). The first of these was decided by the Calcutta High Court, and the second by the Privy Council. The principle which they lay down is, that the creditors of a deceased Muhammadan cannot follow his estate into the hands of a *bonâ fide* transferee for valuable consideration. Their effect is best described in the words used by their Lordships of the Privy Council in the latter of the two cases to which I have referred. Their Lordships say:—"At that time, if Najmooddin were the legitimate son of the deceased—and it has now been decided that he was—he had the right to convey his own share of the inheritance, and was able to pass *a good title* to the alienee, *notwithstanding any debts* which might be due from his deceased father. For that position the case of *Wahidunnissa* v. *Shubrattun* (1) was cited as an authority. In that case, the share of an heir was seized and sold in execution of a decree against the heir, in his individual, and not in his representative, capacity, and it was held that the purchaser had a right to hold the property against a creditor of the ancestor who had obtained a decree for the debt before the seizure in execution. In that case, the creditor was a widow of a deceased Muhammadan, and her claim was in respect of dower. The principle of that case is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personalty."

Such being the effect of these cases, I am of opinion that the ruling of the Privy Council cannot be understood without holding that, upon the death of a Muhammadan owner, the inheritance

(1) 6 B. L. R., 54. (2) I. L. R., 4 Calc. 402.

vests *immediately* in his heirs, and is not suspended by reason of debts being due from the estate of the deceased. It is true that the present question was not then raised in an unmixed and direct form, for there were considerations as to third parties being *bonâ fide* transferees for value, which to some extent contributed to the decision. But no considerations arising from any doctrine of equity relating to "notice" and *bonâ fide* transferees for value, could render the title of a transferee from a Muhammadan heir valid, where such transfer was made before the liquidation of the ancestor's debts, and if such liquidation were the turning point of the *devolution* of the inheritance. The Privy Council ruling is therefore a clear authority in support of my view, and indeed I may go the length of saying that no other view can reconcile the ruling with the undoubted principles of law and equity in such cases. But a short time before the Privy Council delivered their judgment, the same question regarding the devolution of inheritance was raised, but again indirectly, in the Calcutta High Court in *Assamathem Nessa Bibi* v. *Roy Lutchmeeput Sing* (1). That was a Full Bench case in which two of the learned Judges dissented from the opinion of the majority. That opinion was stated by Garth, C. J., but it bears upon the second only of the points before us in the present case. The judgment of the minority was delivered by Markby, J., who considered the question of the *devolution* of Muhammadan inheritance as a necessary step to the conclusions at which he arrived. The learned Judge, relying upon certain passages in the Hedaya, held it to be clear that the estate of an intestate descends entire, together with all the debts due from and owing to the deceased; that it is therefore, to use a convenient expression adopted by lawyers, a "universal succession;" that "there ought, according to the Muhammadan Law, to be in every case of death something very similar to what we should call an administration of the estate by a Court of Justice;" that, under the strict Muhammadan Law, the personal liability of the individual heirs was "something quite distinct from the liability of the estate;" that it was unimportant to determine whether such personal liability was *proportione hereditaria* or *proportione emolumenti*; but that "the liability of the estate remained, f the

(1) I. L. R., 4 Calc. 142.

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creditors chose to resort to that remedy, until the debts had been completely liquidated." And pursuing this argument, the learned Judge went on to say :—" If this be so, it follows, I think, that on the decease of a Muhammadan, neither his estate *vested immediately* in his heirs, nor did his heirs become immediately liable for his debts. Until the heirs came forward to take possession, the succession was vacant (*hæreditas jacens*). But by a fiction the deceased owner was supposed during this interval to be represented by the estate itself (*quia creditum est hæriditatem dominam esse et defuncti locum obtinere*). It is particularly to be observed, however, that it was the deceased owner, and not the heirs, who were thus represented (*personæ vicem sustinet non hæredis futuri sed defuncti*)." This view was not adopted by the majority of the Court, though their judgment mainly proceeds upon another ground, to which I shall refer in dealing with the second point before us.

I now pass to the passages of the Hedaya upon which Markby, J. based his opinion. I have carefully considered them, and I have come to the conclusion that they do not substantiate the conclusions at which that learned Judge arrived. In the first place, it must be remembered that the work to which he was referring is merely a translation of a translation, leaving room for the remark of Mr. Almaric Rumsey, that it is "much to be desired that a new translation should be made of the Hedaya, this time from the original Arabic, and not from the intermediate Persian." I agree in the observation, especially as the English terms employed in Mr. Hamilton's translation are frequently not the equivalents of the original Arabic terms, and are not used with the degree of definiteness essential for a book on law. In the second place, to use the words of Mr. Rumsey again, the law of inheritance is " a branch of jurisprudence which the Hedaya does not formally discuss, but only mentions incidentally here and there." Moreover—and this is the most important point—most of the passages relied upon by Markby, J., relate, not to substantive law, but to procedure, and in particular to the duties of the Kazi in matters connected with partition, compromise, composition, and other similar subjects ; whilst some of the passages do not appear to me to apply to the question—I mean the passage in Vol. II of Mr.

Hamilton's Hedaya, to be found at p. 599, which belongs to the chapter "*Of bail in which two are concerned*", and at pp. 530 and 539 of Vol. IV. The other passages in the Hedaya relied upon by Markby, J., I shall presently consider in discussing the second question referred to us.

I now proceed to cite the original authorities of Muhammadan Law in support of my view. It is well known that the Muhammadan law of inheritance is based upon a passage in the fourth chapter of the Korán, which in Sale's translation is thus rendered: —"God hath thus commanded you concerning your children:— A male shall have as much as the share of two females, but if they be females only, and above two in number, they shall have two-thirds part of what the deceased shall leave; and if there be but one, she shall have the half. And the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part. And if he have brethren, his mother shall have a sixth part, *after the legacies which he shall bequeath, and his debts be paid.* Ye know not whether your parents or your children be of greater use unto you. This is an ordinance from God, and God is knowing and wise. Moreover, ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, *after the legacies which they shall bequeath, and the debts be paid.* They also shall have the fourth part of what ye shall leave, in case ye have no issue; but if he have issue, then they shall have one-eighth part of what ye shall leave, *after the legacies which ye shall bequeath, and your debts be paid.* And if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate. But if there be more than this number, they shall be equal sharers in a third part, *after payment of the legacies which shall be bequeathed and the debts,* without prejudice to the heirs."

In reading this passage, I have emphasized the words "*after the legacies which he shall bequeath and his debts be paid,*" and also other phrases to the same effect, which have been repeated after each part of the passage describing the shares to be allotted to the heirs. These phrases gave rise to two difficulties in the minds

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of the Muhammadan jurists. The first was, whether the circumstance that *legacies* were mentioned before *debts* gave the former precedence over the latter in the administration of the estate of deceased persons; and the second was, whether the word "*after*" related to the devolution of inheritance, or to the ascertainment of the *extent* of the shares to be allotted to the various heirs. There is much learned discussion upon both these points in the Arabic works; but with the former of these points we are not concerned in this case; and in regard to the latter, I will content myself with the explanation of *Baizawi*, one of the greatest commentators on the Koran, whose views have been universally adopted by Muhammadan jurists He says:—"The words *after the legacies which he shall bequeath or debts* relate to that which precedes relating to the *distribution* of all the inheritance; that is, these are to be the shares of the heirs out of that which remains from legacies or debts (1)." The meaning of the explanation is, that the word "*after*," as used in the Korán, simply refers to the *balance* of the estate after the payment of debts and legacies, but does not affect the question of *devolution*. That this is the interpretation accepted by the Muhammadan jurists in general is best shewn by a passage in *Al Sirajiyyah*, a treatise of the highest authority on the Muhammadan Law of inheritance, which Sir William Jones translated about a century ago; and in citing the passage I cannot do better than adopt his words:—"Our learned in the law (to whom God be merciful) say:—There belong to the property of a person deceased four successive duties to be performed by the Magistrate,—first, his funeral ceremony and burial without superfluity of expense, yet without deficiency; next, the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors, according to the Divine Book, to the Traditions, and to the Assent of the Learned"—(Jones's Works, Vol. III, p. 517). I have quoted this passage to show the priority possessed by the three charges to which the estate is

(1) من بعد وصية يوصي بها او دين متعلق بما تقدمه من قسمة المواريث
لها اى هذه الانصباء للورثة من بعد ما كان من وصية او دين (بيضاوي) *

subject when inherited by heirs. This order of priority is, as is obvious from the passage, merely a direction as to the *administration* of the estate, and has no bearing upon the question of the exact point of time when inheritance *devolves* upon the heirs. When they inherit the property, they take it, of course, subject to these three prior charges, as they would subject to mortgages—the difference being (as pointed out by the Privy Council in the case which I have already cited) that an incumbrance by way of mortgage follows the property even in the hands of *bonâ fide* purchasers for value, with or without notice of the prior incumbrance; whilst the three charges on the estate of a deceased Muhammadan as described in *Al Sirajiyyah* cannot do so. It is one thing to say that these three charges take precedence of the inheritance, in the administration of the estate and its distribution among heirs, and it is another thing to say that the inheritance itself does not open up until those charges are satisfied. And it is obvious that all the arguments adopted by Markby, J., as to debts, would, according to his hypothesis, necessarily apply also to *funeral expenses* and *legacies*, which, like debts of the deceased, are charges upon his estate. But I am unaware of any rule of Muhammadan Law which would render such charges, or even mortgages, an impediment to the *devolution* of property on the heirs by inheritance. Funeral expenses, debts, and legacies, or any one or more of them, may indeed absorb the estate of the deceased, defeating every succeeding charge; and it is obvious that if nothing is left for the heirs they can take nothing. But this is a proposition widely different from saying that the *devolution* of inheritance is suspended till the various charges are satisfied. Indeed, upon this point, the books of Muhammadan jurisprudence leave no doubt. The author of the *Ashbah*, a most celebrated book on maxims, lays down the following maxim:—"Nothing enters the proprietorship of man without his option (consent), except inherited property (1);" and the following explanation follows as a commentary:—"They (the Doctors of Law) have differed as to the time of the devolution of inheritance. The learned men of Irak

(1) لا يدخل في ملك الانسان شيئ بغير اختياره الا الارث (اشباه والنظائر) *

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maintain the last part of the ancestor's life, and the learned men of Balakh (maintain that it is) the moment of death (1)."

These authorities leave no doubt in my mind that the devolution of inheritance takes place *immediately* upon the death of the ancestor from whom the property is inherited. But I wish further to adopt certain tests to confirm my view. The first of them is an absolutely universal rule of the law of Muhammadan inheritance itself. The *jus representationis* being absolutely foreign to the Muhammadan law of inheritance, the question of the devolution of inheritance rests entirely upon the exact point of time when the person through whom the heir claims, died—the order of *deaths* being the sole guide in such questions.

The rule of "perfect" exclusion from inheritance—to use the language of *Al Sirajiyyah*—"is grounded on two principles; one of which is, that whoever is related to the deceased through any person, shall not inherit while that person is living; as a son's son with the son; except the mother's children, for they inherit with her, since she has no title to the whole inheritance; the second principle is, that the nearest of blood must take." To illustrate the principles, I adopt the language of Sir William Macnaghten:—"The son of a person deceased shall not represent such person, if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance if he have a paternal uncle. For instance, *A*, *B*, and *C*, are grandfather, father, and son. The father *B* dies in the life-time of the grandfather *A*. In this case, the son *C* shall not take *jure representationis*, but the estate will go to the other sons of *A*." Now, in the above illustration, if we suppose that *A* died leaving both *B* and *C*, but *B* died before the debts and legacies were satisfied, the question would arise whether *C* would take a share along with his uncles, the other sons of *A*. The answer to the question depends absolutely upon the answer to the question whether *immediately* upon the *death* of *A* any share in the inheritance devolved upon *B*, for, if it did not, then *C* can have no vested interest in the

(1) اختلفوا في وقت الارث فقال مشائخ العراق في آخر جزء من اجزاء حيات المورث و قال مشائخ بلخ عند الموت (اشباه والنظائر) *

inheritance. According to the views of Markby, J., upon the death of *A* "neither his estate *vested* immediately in his heirs, nor did his heirs become immediately liable to his debts;" for "until the heirs came forward to take possession, the succession was vacant." And, according to this hypothesis, *C* could take no share, because the debts and legacies of *A* not having been paid before the death of *B*, no share of the inheritance vested in him, and his son *C* could take no share along with his paternal uncles. That this would be the necessary result of the reasoning of Markby, J., seems to me to be obvious; but it is equally obvious that the Muhammadan rules of inheritance furnish quite the opposite answer. The law upon the subject has been well summarised by Sir William Macnaghten, and I adopt his words because they are in perfect accord with the rules contained in *Al Sirajiyyah, Sharifiyyah,* and other authoritative Arabic treatises on the Muhammadan law of inheritance. Where a person *dies* and leaves heirs, some of whom die prior to any *distribution* of the estate, the survivors are said to have *vested* interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his *death;* and it must be supposed that they received their respective shares accordingly." Mr. Baillie, proceeding even more closely upon the Arabic texts, has enunciated the same rule in his work on Muhammadan inheritance:—"When some of the portions have become inheritances by the death of the parties entitled to them, before the estate has been *actually divided* among them ..... the rule is to arrange the original estate on the principles already explained, and to assign to each original heir his or her share, and then to arrange his or her estate, that is, his or her share of the original estate, on the same principles." It is clear from these passages that in the case supposed by me, *C* would take the share in the estate of *A*—a proposition which directly contradicts the conclusion at which Markby, J. arrived. Indeed, I may go the length of saying that some of the most important and undoubted rules of Muhammadan inheritance would become meaningless if any event other than the ancestor's *death* were to be considered as the point of the *devolution* of inheritance upon heirs.

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It is scarcely necessary for me to pursue the argument much further, but I will, however, take a few illustrations to justify the proposition which I have just laid down. Take the case of missing persons under the Muhammadan Law of inheritance. Not long ago, in the case of *Mazhar Ali* v. *Budh Singh* (1) I had occasion to discuss the matter at full length, and here I will only say that the inheritance to his estate opens up at the moment when, by a legal presumption, he is taken to be *dead*, and all the arguments of the Muhammadan jurists make the presumption of the *death* of the missing person as the turning point of the devolution of inheritance on his heirs. To use the words of Mr. Almaric Rumsey in his work on Muhammadan inheritance, it must be remembered that "the lost or missing person is deemed to *die*, not at the date at which he has become such, but at the precise time at which the declaration of his *death* is made; *consequently* his relations dying before *that time* cannot inherit from him." Now, taking the case of persons dying by a common calamity, it will be found that the rules of Muhammadan inheritance again treat *death* as the turning point of the *devolution*. I will show this by citing a passage from Baillie's Digest, as it is taken from the text of the *Fatawa-i-Alamgiri*:—"Where several persons have been drowned or burnt together, and it is not known which of them *died* first, we treat them all as having *died* together. The property of each will accordingly go to his own heirs, and none of them can be heirs to another, unless it is known in what order they *died*, when those who died last will inherit to those who died before them. And the rule is the same when several are killed together by the falling of a wall, or in the field of battle, and it is not known which of them *died* first." I might go further, and show that all the rules relating to the inheritance by or from posthumous children, proceeding upon the analogy of the rules relating to missing persons, render *death* as the only turning point of the *devolution* of inheritance. But I will take a case having even a more directly analogical bearing upon the point now under consideration. It needs no citation of authorities to say that, under the Muhammadan Law, no property or right can be transferred or relinquished by the per-

(1) *Ante*, p 297.

son entitled thereto, unless it is *vested* in him ; that no valid will can be made in favour of an heir; that, even in favour of a stranger, a bequest can hold good only to the extent of a third of the property of the testator remaining after payment of his funeral expenses and debts ; and that a bequest, notwithstanding these limitations, may be validated, and take effect with the *consent* of the testator's heirs. I have mentioned these rules as a statement of the premises from which I shall draw my conclusion The question then arises, when should the consent of the heirs be given in order to render effective a will which exceeds the limitations imposed upon the testamentary power by the Muhammadan Law? The answer is furnished by a passage of the Hedaya, which I will translate here from the original Arabic, although a paraphrase of the passage exists in Mr. Hamilton's translations (Vol. IV, p. 470) :—"Their (the heirs') consent during his (the testator's) life-time is not acceptable, for the reason that it would be previous to the *establishment* of their right. As their right is established upon the *death* (of the testator), therefore it is for them (*i e.*, they are at liberty) to reject it after his *death*, because it would then be after the establishment of their right, and therefore it is not for them to recede from it (1)." This is the prevalent doctrine of the school of Imam Abu Hanifa which governs this case. But some of the jurists of the same school, whilst doubting the reasoning, have adopted the same doctrine on the ground that, although a testamentary disposition in contravention of the limitations of law would, in itself, be illegal, yet effect would be given to it, because the consent of the heirs given after the *death* of the testator amounts to dealing with *their own* property, so that not the testamentary disposition, but the consent of the heirs, takes legal effect. This is shown by a passage in the *Fatáwá Kazi Khan*:—"As Sheikh-ul-Imam Al-Ali-us-Safdi has said that the answer of Abu Hanifa is difficult. He has allowed composition (regarding legacies) on the ground that the property in reality belongs to the heir on account

(1) ولا معتبر باجازتهم فى حال حياته لانه قبل ثبوت الحق اذ الحق يثبت عند الموت فكان لهم ان يردوه بعد وفاته بخلاف ما بعد الموت لانه بعد ثبوت الحق فليس لهم ان يراجعوا عنه (هدايه) *

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of the extinction of the ownership of the deceased, and on account of its transfer to the heir, and it remains as if it was the property of the deceased for the needs of the deceased. Therefore *before* it was so employed for the needs of the deceased, it becomes the property of the heir, and when the purposes of the deceased are not attained, the property remains in the ownership of the heir (1)." In these passages there is not the slightest indication that the payment of funeral expenses, debts, or legacies, is a condition precedent to the *vesting* of the inheritance. These, of course, are charges upon the estate of the deceased in the sense in which I have already explained them; and I may concede that no distribution of the assets of a deceased Muhammadan's estate among his heirs can be made irrespective of those charges. But this has no bearing upon the question of the *devolution* of inheritance—a question which rests upon a reasoning analogical in principle to that which relates to the vesting of legacies considered by me not long ago in *Bachman* v. *Bachman* (2). The inheritance of an heir, like a legacy, may be absolutely defeated if the debts of the deceased at the time of the administration of his estate are found to absorb the whole of his property. But this has no more bearing upon the question of the *devolution* of inheritance than upon the vesting of legacies, and I may say that in neither case is distribution or division of the estate a condition precedent to the vesting of the right. In the case of legacies, the terms of a will might, of course, affect the ordinary rule, and division may possibly be made a condition precedent to the vesting of the legacy. But I need not resort to analogies, for the texts of the Muhammadan Law leave no doubt that distribution of the estate, or the payment of debts of the deceased, is not a condition precedent to the *devolution* of inheritance. Here is a passage from *Fatawa Kazi Khan*:—"A man

(1) قال الشيخ الامام العلي السغدي جواب ابي خليفة مشكل و إنما اجاز الصلح لان هذا المال في الحقيقة مال الوارث لزوال ملك الميت والانتقال الى الوارث و انما يبقى على حكم ملك الميت لحاجة الميت فقبل ان يصرف الى حاجة الميت يكون المال مال الوارث فاذا لم يحصل غرض الميت بقى المال على ملك الوارث (قاضي خان جلد رابع) *

(2) I. L. R., 6 All 583.

died, and his heirs, by mutual consent, divided the inheritance among themselves, and then one of them, on his own behalf, brought a claim for debt due by the deceased. His claim will be entertained *because debt neither prevents the establishment of the heir's proprietorship nor division* (of the inheritance) (1)." If it were necessary to carry the argument further, I might cite many passages even from the Muhammadan law of slavery (which, happily for mankind, is no longer the law of British India), which would support my view. It is, however, sufficient to say here that "*Itak*" or manumission of slaves is a power which can be exercised only by the full owner of the slave, and if the slave forms part of the inheritance, the heir can emancipate him, and the emancipation will take effect even though such manumission took place *before* payment of the debts of the deceased from whom the slave was inherited, the reason of the rule being, as stated by *Kazi Khan* (2), that the ownership of the heir was complete at the time of the manumission.

There is one more point to be considered in connection with the first question referred to us in this case. I hope I have said enough to show that the existence of debts due by the deceased does not affect the period of devolution of inheritance; but the point remains whether the *extent* or *amount* of the debts affects the question. Some of the passages quoted from Mr. Hamilton's Hedaya in the Full Bench case of *Hamir Singh* v. *Musammat Zakia* (3) would go to indicate an affirmative answer. But the translation is only a loose paraphrase of the original Arabic, and is liable to convey a wrong meaning. What is meant by the heirs to an insolvent estate being *prevented* from inheriting, simply refers to the rule that nothing will be left for them to inherit if the liabilities of the deceased swallow up the whole estate. It is only in this sense that Mr. Hamilton's translation can be understood, when it says that "the circumstance of a *small* debt

(1) رجل مات و اقتسمت ورثته التركة بتراضيهم ثم ادعى احدهم لنفسه على الميت دينا سمع دعواه لان الدين لا يمنع ثبوت الملك للوارث والقسمة (قاضي خان جلد ثالث) *

(2) وانه ينفذ اعتاق الوارث لان ثم سبب الملك للوارث تام (قاضي خان)

(3) I. L. R., 1 All. 57.

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attaching to the estate of a deceased person does not prevent the heirs from inheriting, whereas if the estate were completely involved in debt they would be prevented."—(Hedaya, Bk. XXVI.) I do not think it necessary to translate these passages in the Hedaya because, after what I have already said, it seems enough to add that the existence of debts, whether large or small, is quite immaterial. Whatever their extent, nature or amount may be, the property of the deceased is liable to their payment, and their extent regulates the *balance* of the estate only, but does not affect its *devolution*.

The second point in F. A. No. 70 is similar to that raised in F. A. No. 50, and I have dwelt upon the first question at such length because it seems to me that the answer to the second question may be regarded as a corollary to the answer to the first. I have considered the passages of the Hedaya referred to in the Full Bench case of *Hamir Singh* v. *Musammat Zakia* (1), and those cited by Garth, C. J., and Markby, J., in *Assamathem Nessa Bibi* v. *Roy Lutchmeeput Singh* (2) These passages have been understood by those learned Judges as governing the decision of cases like the present. I have also consulted other original authorities, such as *Fatáwá Kazi Khan*, *Durrul Mukhtar*, *Shami*, and *Fathul Kadir*. All these books possess high authority, and no doubt there are passages to be found in them, as in the Hedaya, which attach significance to such questions as the following:—whether the heir is in possession, whether he is in possession of the whole or only a part of the estate, the amount of the assets in his hands, whether the suit was contentious or non-contentious, whether the decree was passed *ex-parte* or in the presence of the defendant, and these points the authorities treat as regulating or at least affecting the binding effect of the decree upon those heirs who, being either out of possession or absent, are no parties to the litigation. On the other hand, there are passages to show that the decree will bind only the share of the defendant heir, or only so much of the property of the deceased as is in the hands of such defendant; whilst other passages lay down the rule that, even where no property belonging to the deceased has come to the hands of the heirs, the creditor of the deceased must sue them

(1) I. L. R, 1 All. 57. (2) I. L. R., 4 Calc. 142.

in order to obtain a decree, which might be executed against any such property of the deceased as may be subsequently discovered.

The rule is thus laid down in *Fatáwá Kazi Khan* :—"If the debtor has died without leaving any property in the hands of the heir, even then the heir will be (impleaded as) defendant for the claimant of the debt (that is, the creditor), and evidence will be taken and decree will be passed as to the debt, in order that the creditor may take any assets of the deceased which may be discovered (1)." This rule is the same as that laid down by Morgan, C. J., and Ross, J., in *Madho Ram* v. *Dilbur Mahul* (2), and, although the case related to the estate of a deceased Muhammadan, those learned Judges decided it without any reference to the Muhammadan Law, and treated the question as simply a matter of procedure. Again, according to the authorities of the Muhammadan Law, to which I have referred, the power of one or more heirs to represent absent heirs in a litigation is regulated by the consideration whether the litigant-heir appears in the suit as *plaintiff* or as *defendant;* and the power of representation is materially affected by the position of the litigant-heir as party to the suit. Further, there is authority for the proposition that a decree passed against the heir in possession as representing the whole estate of the deceased in the litigation may, under certain circumstances, be set aside at the instance of the absent heir to the extent of his share, and that, when this is done, the matter should be adjudicated upon *de novo*, involving the production of evidence by the plaintiff *again*, in order to justify the correctness of the former decision. I do not consider it necessary to cite the original texts which go to maintain these propositions, because I am satisfied that these rules of law are provisions which go only to the remedy, *ad litis ordinationem*, being matters purely of procedure as to array of parties, production of evidence, *res judicata*, and review of judgment, &c. Indeed, they are treated as such in the text-books of the Muham-

(1) لوكان المديون مات و لم يترك مالا في يدوارثه قال الوارث يكون خصما للمدعي الدين و يقبل بينة و يقضى بدينه حتى لوظهر للميت مال اخذه صاحب الدين (قاضي خان جلد ثالث) *

(2) N.-W. P. H. C. Rep., 1870, p. 449.

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madan Law itself, and are *in pari materiâ* with some of the most important provisions of our Civil Procedure Code. They are not matters of substantive law; they do not constitute rules of inheritance; and the Courts in British India are no more bound by them than by any such rules of evidence or limitation as the Muhammadan Law may provide, for the simple reason that they fall outside the purview of s. 24 of the Bengal Civil Courts Act, which enumerates the matters in which we are bound to administer the Muhammadan Law. Under the opposite view, these rules would be in the anomalous position of conflicting with the provisions of the Civil Procedure Code upon the same subjects, and at the same time be equally binding upon the Courts. But for the reasons which I have already stated, I do not think any such conflict arises out of the present state of the law in British India. Upon the death of a Muhammadan owner, his property, as I have already shown, immediately devolves upon his heirs, in specific shares; and if there are any claims against the estate, and they are litigated, the matter passes into the region of *procedure*, and must be regulated according to the law which governs the action of the Court. The plaintiff must go to the Court having jurisdiction, and institute his suit within limitation, impleading all the heirs against whose shares he seeks to enforce his claim; and if he omits to implead any of the heirs, the decree would be ineffective as regards the share of those who were no parties to the litigation. The maxim of law, that a matter adjudicated upon between one set of parties in no wise prejudices another set of parties, is, of course, the foundation of one of the rules of *res judicata*, which itself is subject to strict limitation, as shown by s. 13 of the Civil Procedure Code; whilst even *Explanation V* of that section cannot be applied, unless the especial provisions of s. 30 of the Code are applicable, and have been duly applied by the Court in allowing one party to sue or defend on behalf of all in the same interest. There is, however, no such question in these cases, and to hold that a decree obtained by a creditor of the deceased against *some* of his heirs, will bind also those heirs who were no parties to the suit, amounts to giving a judgment *inter partes*, or rather a judgment *in personam*, the binding effect of a judgment *in rem*, which the law limits to cases provided for by s. 41 of the Evidence Act.

But our law warrants no such course, and the reason seems to me to be obvious. Muhammadan heirs are independent owners of their specific shares, and if they take their shares subject to the charge of the debts of the deceased, their liability is in proportion to the extent of their shares. And once this is conceded, the maxim *res inter alios acta alteri nocere non debet* would apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family. Now, putting aside questions of fraud or collusion between the creditors of the deceased and the heir in possession, it may well be that such heir, though defending the suit, is incompetent to contest the claim, or, by reason of not being acquainted with the facts of the case, or not possessing evidence, cannot properly resist the claim. There seems no reason why, in such a case, those should be bound by the decree who were no parties to the litigation, and had no opportunity of defending themselves against the creditor's claim by putting forward their own case.

This leads me to the considerations of the various rulings having a bearing upon the question now under consideration. In the case of *Assamathem Nessa Bibi* v. *Roy Lutchmeeput Singh* (1) the judgment of Markby, J. proceeds considerably upon the inferences which he drew from cases relating to the joint Hindu family , and the power of one member to represent the whole of the joint estate in litigation. I have already suggested that there are such essential distinctions between the Hindu Law relating to a joint family and the Muhammadan Law of inheritance that it would be unsafe to drawn any conclusion by analogical reasoning. On the other hand, it is obvious that the conclusion at which that learned Judge arrived as to the power of the heir in possession to represent the estate in litigation, was materially induced by the opinion which he formed regarding the devolution of Muhammadan inheritance, which he discussed as the first point in the case. Now, I am unable to agree fully in the judgment of Garth, C. J., in which Kemp and Jackson, JJ. concurred. There is much in the *ratio decidendi* with which I entirely agree, and there is no doubt that the distinction which the judgment draws between a decree passed by consent and a decree passed in a contested suit, is

(1) I. L. R., 4 Calc. 142.

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borne out by certain passages of the Hedaya, to which the learned Chief Justice referred. But, with due deference, I am unable to adopt the distinction, because, as I have already pointed out, those passages lay down rules of *procedure* which are not binding upon us, which are in many important respects inconsistent with the rules of the Civil Procedure Code, and, at all events, we can scarcely adopt some of them with consistency, unless we are prepared to adopt also other rules of the Muhammadan Law of Procedure which are complements of the rules so adopted. According to our own rules of procedure, there is no distinction between the binding effect of a decree passed by consent, and a decree passed in a contested suit. Both render the matter *res judicata*, and neither can bind those persons who were no parties to the litigation. There were, of course, reasons arising from the exigencies of life (such as the difficulty of communication and travelling) which induced Muhammadan jurists in the middle ages to frame rules of procedure in many essentials different from those which regulate the procedure of our Courts. But those conditions of life no longer exist : the law of British India has framed its own rules of procedure; and bearing in mind the analogy of the principle by which, not the *lex loci contractus*, but the *lex fori*, regulates all matters going to the remedy, *ad litis ordinationem*, I would reject the rules of the Muhammadan Law of Procedure in connection with the binding effect of decrees upon absent heirs. And it follows that a decree obtained in a litigation to which the absent heirs or those who were out of possession were no parties, cannot be executed against them or against their shares in the inherited property. Indeed, such was the view adopted by Garth, C J., himself in an earlier case—*Hendry* v. *Mutty Lall Dhur* (1), with which I entirely concur, and which is in accord with the Full Bench ruling of this Court in *Hamir Singh* v. *Musammat Zakia* (2).

There is, however, one more important case, and the latest ruling upon the subject, which I must consider. This is the case of *Muttyjan* v. *Ahmed Ally* (3), in which Morris, J., with the concurrence of O'Kinealy, J., went the length of laying down the broad rule that when the creditor of a deceased Muhammadan sues

(1) I. L. R., 2 Calc 395. (2) I L. R, 1 All. 57.
(3) I L. R., 8. Calc 370.

the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.

For this view of the law the learned Judges relied upon certain rulings, two of them being decisions of the Privy Council. I have consulted these cases, but I confess, with due respect, that I am unable to see how they support the broad rule of law laid down in that case. It seems to me that the nature of an administration-suit is essentially different from an ordinary suit for money brought by a creditor of a deceased person against his heir. I need only refer to s. 213 and to Nos. 105, 130, and 131 of the fourth schedule, read with s. 644 of the Civil Procedure Code, to explain my conception of the nature of an administration-suit. It appears to me that if every suit to recover a debt from the heir of a deceased debtor, irrespective of the form in which it has been instituted, is to be regarded as an administration-suit, any suit for money or any claim, however small, by tradesmen, may be so considered, creating anomalies and difficulties upon which I need not, however, dwell. The rest of the rule laid down by Morris, J., is met by what I have already said, and seems to me to be contradicted by the rulings of Garth, C J., in the two cases to which I have already referred. My answer to the second question referred to us is, therefore, entirely in the negative, and I give the answer, holding that it is unaffected by the question whether the decree is passed by consent or in a contentious suit, whether the heir is in possession of the whole or only a part of the estate of the deceased, or whether he is present or absent, in possession or out of possession. The same answer applies to the point referred in the connected case F. A. No. 50 of 1883.

The third question referred to us in this case does not depend upon any rule peculiar to the Muhammadan Law; but upon the general principles of equity. The first point involved in the question is, whether in a case such as that contemplated, any equity exists in favour of the auction-purchaser, entitling him to retain the property till the plaintiff recoups him to the extent

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of his share of the ancestor's debts liquidated by the proceeds of the auction-sale. If so, then the second point is, whether effect can be given to that equity by a decree in this case.

In my opinion both points must be answered in the affirmative.

The general principles of equity in such cases are to be found in ss. 696, 707, and 238*a* of Story's celebrated work on Equity Jurisprudence, where illustrations are given of the general maxim, that he who seeks the aid of equity must do equity. For instance, as the learned author puts it, "in many cases where the instrument is declared void by positive law, and also where it is held void or voidable upon other principles, Courts of equity will impose terms upon the party, if the circumstances of the case require it" Such seems to be the principle which underlies the judgment of a Division Bench of this Court in *Mirza Pona Ali* v. *Saiad Sadik Hossein* (1), in which, although the learned Judges held a deed of sale, whereby the mother of a Muhammadan minor had sold his share in the estate of his deceased father, to be invalid, they dismissed his claim to recover possession of the share from the purchasers, who had redeemed a mortgage existing on the estate created by his father, because the plaintiff did not tender payment of his share of the mortgage debt. The learned Judges, however, do not appear, from the report of the case, to have considered the question whether in such a case a conditional decree could not be passed. The question, however, was decided by a Full Bench of this Court in *Hamir Singh* v. *Musammat Zakia* (2), in which it was held that in such a case a decree might be passed for possession in favour of the plaintiff, "but it is only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected" The same rule was adopted by a Division Bench of this Court in *Gulshere Khan* v. *Náubey Khan* (3). In both these cases the sale was a private alienation, whilst in the present case the sale took place in execution of a decree to which the plaintiff was no party. But in my opinion this distinction does not alter the principle which enables Courts of equity to exercise a vast and flexible jurisdiction for adapting their decrees to the requirements of each case "Some

(1) N.-W. P. H. C. Rep., 1875, p. 201. (2) I. L. R., 1 All. 57.
(3) Weekly Notes, 1881, p 20.

modifications of the rights of both parties may be required; some restraints on one side or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some compensatory or preliminary or concurrent proceedings to fix, contract, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries. In all these cases, Courts of common law cannot grant the desired relief.....But Courts of equity are not so restrained. They may adjust their decrees so as to meet most, if not all, of these exigencies, and they may vary, qualify, restrain, and model the remedy so as to suit it in mutual and adverse claims, controlling equities, and the real, and substantial rights of all the parties"—Story's *Equity Jurisprudence*, ss. 27, 28. And, applying these principles to the present case, my answer to the third question is, that the plaintiff cannot obtain a decree for possession of his share of the property in suit without such decree being rendered contingent upon payment by him of such proportion of the purchase-money as would represent his proportionate share of the liability to the ancestor's debts liquidated by the proceeds of the auction-sale.

I wish to add that I have considered it my duty to consider this case at such length because of the conflict of decision existing in the Reports, which has thrown much doubt upon important rules of law governing the inheritance of a population nearly as large as the whole of the German-speaking population of Europe.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

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INDAR SEN AND ANOTHER (DEFENDANTS) *v.* NAUBAT SINGH AND OTHERS (PLAINTIFFS).*

Landholder and tenant—Ex-proprietary tenant—Relinquishment of ex-proprietary rights—Act XII of 1881 (*N.-W. P. Rent Act*), *ss.* 9, 31.

Held, by the Full Bench that an ex-proprietary tenant is not competent to relinquish his holding to his landlord by private arrangement.

Per PETHERAM, C. J.—S. 31 of the N.-W. P. Rent Act (XII of 1881) was enacted absolutely in the interests of the cultivator, and provides, in effect, that although the occupancy tenant may not be turned out, and may not transfer his

* First Appeal No. 18 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 19th May, 1883.

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rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that, in that case, he is not liable for rent; but this provision must not be taken advantage of by letting the zamindar buy the holding, and thus introducing a new cultivator, contrary to the prohibition contained in s. 9.

THE plaintiffs in this case sued the defendants for possession of certain shares in certain mauzas and certain shops, claiming as usufructuary mortgagees under a deed dated the 3rd April, 1882, executed in their favour by the defendants. This deed conveyed to the plaintiffs all the rights and interests appertaining to the shares in the mauzas, together with the "*haq khud kasht.*" The Court of first instance decreed the claim. The defendants appealed to the High Court, contending that "a decree for possession of the *sír*-land was contrary to law." With reference to this contention, the Divisional Bench (PETHERAM, C. J., and BRODHURST, J.), hearing the appeal, referred to the Full Bench the question—"Whether a person who creates a usufructuary mortgage of zamindari property becomes an ex-proprietary or occupancy-tenant of the *sír*-land, under s. 7 of the Rent Act, 1881?" This question having been answered in the affirmative by the majority of the Judges (1), the case came again before the Divisional Bench. It was then contended, on behalf of the respondents, that the appellants had relinquished their rights in respect of their *sír*-land in a mauza called Rukmipur, their share in which was part of the mortgaged property. The respondents relied on an instrument executed by the appellants, dated the 26th April, 1882. This instrument, after reciting the mortgage, continued as follows:—

"Fifty-six *pukta* bighas and sixteen biswas of land have been in our cultivation, and we of our free will and consent have relinquished the said land to the mortgagees, which they have accepted. Therefore we hereby declare that neither we nor our heirs shall have any claim to the rights of cultivation. If we claim them, then our claim will not be cognizable. The mortgagees are at liberty to give the cultivatory land for cultivation to whomsoever they may like, or keep it in their cultivation: we have nothing to do with it. Therefore these few words, by way of relinquishment of cultivation, have been written that they may be of use when needed."

(1) *Ante*, p. 553.

The Divisional Bench thereupon referred to the Full Bench the question—Whether an ex-proprietary tenant could relinquish his holding to his landlord by private arrangement?

Babu *Ratan Chand*, for the appellants.

Mr. *J. Simeon*, for the respondents.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—This was a suit brought by a mortgagee for possession of the mortgaged property, which was a zámindari interest belonging to the defendant, including *sír*-land. The first question which arose in the case was—What is the position of a zamindar who has mortgaged his interest with possession, in reference to his *sír*? That point was decided by the ruling of the Full Bench, dated the 7th March (1). The Court then held that the zamindar's position was that of an ex-proprietary tenant under the Rent Act, a mortgage being a transfer of a proprietary interest. After this decision, the case came before a Divisional Bench, and a further question then arose. It appears that, after the mortgage and the creation of the ex-proprietary tenancy, the defendant relinquished his ex-proprietary rights in favour of the new zamindar, the mortgagee. The question now is, whether the transaction can be enforced, because, although the ex-proprietary tenancy was relinquished, the mortgagee was never put in possession, and the agreement is still executory.

I am of opinion that the transaction cannot be recognized. The position of an ex-proprietary tenant is defined by the Rent Act. S. 7 creates the tenancy ; s. 9 lays down certain rules relating to transfer, and provides that "the rights of tenants at fixed rates may devolve by succession or be transferred. No other right of occupancy shall be transferable in execution of a decree, or otherwise than by voluntary transfer between persons in favour of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein." The plain meaning of this is, that occupancy-tenants (including all who occupy the land for their subsistance except tenants at fixed rates) are not competent to sell their rights, except to co-sharers in the same interest. Where a number of persons are jointly engaged in the cultiva-

(1) *Ante*, p. 553.

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tion of land, they may, as between themselves, sell their occupancy-rights. In other words, any one of them may so transfer his rights that, in a case where, for instance, six persons originally were in joint cultivation, one of them has gone, and only five of the original joint cultivators remain. No stranger, however, is introduced into the original body. We here have the case of a mortgage, and a new class of occupancy-tenants created in the person of the mortgagor. The mortgagor then proposes to relinquish his rights in favour of the landlord. Now, if this were a valid transaction, the landlord would in effect become a joint cultivator with the other co-sharers. This means the introduction of an outsider as an occupancy-tenant, and that is exactly what the law prohibits. S. 31 of the Rent Act was enacted by the Legislature absolutely in the interests of the cultivator. It provides in effect that, although the occupancy-tenant may not be turned out, and may not transfer his rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that in that case he is not liable for rent. This provision has been taken advantage of by letting the zamindar buy the holding, and thus introducing a new cultivator. My answer to this reference is, that the occupancy-tenant's interest is not absolute, and that the mortgagor cannot, under the circumstances, be ejected from the *sir*-land by the new zamindar, the mortgagee.

STRAIGHT, J.—As I understand the question put by this reference, it is virtually this:—Can an ex-proprietary tenant relinquish his ex-proprietary tenancy to his landlord by private arrangement?

The circumstances of the case are, that on the 3rd April, 1882, a mortgage-deed was executed by the defendant in favour of the plaintiff, and the latter now sues for possession of the property. On the 26th April, a document was executed, which virtually assigned or relinquished the ex-proprietary rights which, under the recent ruling of the Full Bench, the mortgagor had acquired on the completion of the mortgage.

It is contended, on behalf of the mortgagee, that the document is a valid one, and that it should be recognized and enforced. In the first place, it does not recite any consideration; and if a

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document is executed for no consideration, it cannot be enforced. But it has been said that there *was* some consideration, namely, the release of the mortgagor from payment of the rent, which otherwise would have been due from him. If this is correct, there is a transfer of ex-proprietary rights by the mortgagor in favour of the mortgagee, and that is a transaction in the teeth of s. 9 of the Rent Act. So that, whichever way we look at the matter, the contract is either unenforceable or prohibited by s. 9. I am of opinion that it is not competent for an ex-proprietary tenant, by private arrangement, to transfer his ex-proprietary rights to his landlord; and in this view I concur in the answer given to this reference by the Chief Justice. The result is, that in any decree in this suit giving possession to the mortgagee, he cannot obtain the ex-proprietary rights referred to in the deed.

BRODHURST, J.—I am of the same opinion.

TYRRELL, J.—I am of the same opinion.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr Justice Straight, Mr. Justice Brodhurst, and Mr Justice Tyrrell.

1885 *June* 13.

MURLI RAI AND OTHERS (PLAINTIFFS) *v.* LEDRI AND ANOTHER (DEFENDANTS)*.

Landholder and tenant—Mortgage by conditional sale of occupancy rights to zamindar —Act XVIII of 1873 (*N.-W. P. Rent Act*), *s.* 9—*Act XII of* 1881 (*N.-W. P. Rent Act*), *ss.* 2, 9.

The occupancy-tenant of certain land, before the N.-W. P. Rent Act (XII of 1881) came into force, mortgaged his rights to his zamindars by a deed of conditional sale The zamindars sued the heirs of the conditional vendee for foreclosure and possession of the mortgaged property.

Held by the Full Bench that the terms of the judgment of the Full Bench in *Naik Ram Singh* v. *Murli Dhar* (1) were directly applicable to the case, and that the transaction of mortgage, which was subsequently to become a sale, was not a transaction to which s. 2 of the Rent Act applied, because the sale would not have effect till after the Act came into operation.

IN this case, the occupancy-tenant of certain land, before the N.-W. P. Rent Act (XII of 1881) came into force, executed a deed of mortgage by conditional sale of his rights and interests in favour of his zamindars. The latter brought the present suit

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* Second Appeal No 1015 of 1884, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghazipur, dated the 14th June, 1884, reversing a decree of Babu Nil Madhab Roy, Munsif of Ghazipur, dated the 12th December, 1883.

(1) I. L. R., 4 All. 371.

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against the heirs of the conditional vendee for foreclosure and possession of the mortgaged property. The defendants pleaded that the property in suit, being an occupancy holding, was not legally transferable. Upon this issue, the Court of first instance held that the transfer was valid, on the ground that it had been made in favour of the zamindars, and "it would be unreasonable to hold that a landholder should not be free to cause sales in execution of his own decree of the occupancy right of his own judgment-debtor in land belonging to himself—*Umrao Begam* v. *The Land Mortgage Bank of India* (1)." The Court accordingly decreed the claim. The defendants appealed. The lower appellate Court reversed the decision of the Court of first instance, and dismissed the suit, in the following terms:—"The decision relied on by the lower Court seems to me to have been clearly overruled by *Phalli* v. *Matabadal* (2), and the mortgage of the right of occupancy, which is the subject matter in dispute in this suit, is absolutely void under s. 9 of the Rent Act. The decision of the Lower Court must therefore be reversed."

The plaintiffs appealed to the High Court, on the ground that "the lower appellate Court had misconstrued the provisions of Act XII of 1881." The appeal came on for hearing before Petheram, C. J., and Brodhurst, J., who referred the case to the Full Bench.

Munshi *Kashi Prasad*, for the appellants.

Mr. *J. E. Howard*, for the respondents.

STRAIGHT, J.—For the purpose of answering this reference, it does not appear necessary to deal with, or to discuss the propriety of the judgment of the Full Bench in *Umrao Begam* v. *The Land Mortgage Bank of India* (1). The ground upon which I think that the reference should be answered is, that the terms of the judgment of the Full Bench in *Naik Ram Singh* v. *Murli Dhar* (3) are directly applicable to the present case; and I am of opinion that we ought not to hold that the transaction of mortgage, which was subsequently to become a sale, was a transaction to which s. 2 applied, because the sale would not have effect till after the Act came into operation.

PETHERAM, C. J., BRODHURST, J., and TYRRELL, J., concurred.

(1) I. L. R., 2 All. 451. (2) Weekly Notes, 1883, p. 7.
(3) I. L. R., 4 All. 371.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1885
June 13.

QUEEN-EMPRESS *v.* LASKARI.

Criminal Procedure Code, ss. 17, 435, 437—"*Inferior*"—"*Subordinate*"—*First class Magistrate "subordinate" to Magistrate of District.*

A Magistrate of the first class is, within the meaning of s. 437 of the Criminal Procedure Code, "subordinate" to the Magistrate of the District, who is therefore competent to call for the record of the former, and to deal with it under s. 437.

THIS case was referred to the High Court for orders, by the Sessions Judge of Gorakhpur, under s. 438 of the Criminal Procedure Code. The question raised by the reference was, whether a Magistrate of a District was competent to call for the record of a Magistrate of the first class, and to deal with it under the provisions of s. 437 of the Criminal Procedure Code. The reference was made in consequence of the ruling of Duthoit, J., in *Jhinguri* v. *Bachu* (1) to the effect that the Magistrate of the District was not competent to send for the file of a first class Magistrate in the manner contemplated by s. 437. The case came on for hearing before Straight, J., who, in view of the importance of the question involved, and the conflict of opinion that appeared to exist on the subject, referred it to the Full Bench.

The *Public Prosecutor* (Mr. *C. H. Hill*) for the Crown.

The following judgments were delivered by the Full Bench :—

STRAIGHT, J.—The question which we are asked by this reference virtually is, whether a Magistrate of the first class is, within the meaning of s. 437 of the Criminal Procedure Code, "subordinate" to the Magistrate of the District. In my opinion this question should be answered in the affirmative ; and I wish to add a few observations with the object of explaining some mistakes which appear to me to have been made in reference to some of the sections in Chapter XXXII of the Code. By s. 435 it is provided that "the High Court or any Court of Session, or District Magistrate, or any Sub-Divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any *inferior* Criminal Court." I am of opinion that the word "inferior" was here used because in former rulings it had been held that the Magistrate of the Dis-

(1) *Ante*, p. 134.

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trict was not "subordinate" to the Sessions Court. Under s. 435 it is obvious that a Court of Session has a right to call for the record of the Magistrate of the District, not as "subordinate," but as "inferior" to the former Court, and therefore the word "inferior" has been used to meet the rulings to the effect that the District Magistrate is not "subordinate" to the Sessions Court. The section goes on to provide that "if any Sub-Divisional Magistrate, acting under this section, considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate." The result is that, under s. 435, certain tribunals are invested with the power of calling for the records of Courts "inferior" to them, that is, inferior for purposes of jurisdiction. Now, when the record has come up under s. 435, s. 436 provides that the Court of Session or the District Magistrate alone may do certain things, and s. 437 confers a power upon the Court of Session and the District Magistrate, which they did not possess under the old Code, of directing Magistrates "subordinate" to the District Magistrate to make further inquiry into any case which has been dismissed. The term "subordinate" is explained by s. 17 of the Code, and that section seems to show beyond question that a Magistrate of the first class is subordinate to the District Magistrate. It follows that an order passed by a District Magistrate under s. 437 to a Magistrate of the first class in his District, is an order which the latter is bound to obey, and I am therefore of opinion that this reference should be answered in the affirmative.

PETHERAM, C. J., concurred.

BRODHURST, J.—I concur in holding that a District Magistrate is competent to call for the record of any Magistrate in his District, and to deal with it under s. 437 of the Criminal Procedure Code.

TYRRELL, J.—I am of the same opinion. In reference to my brother Straight's observations as to the reason why the word "inferior" is used in s. 435 instead of the word "subordinate," I may add that the rulings which gave rise to that expression have een embodied in the last sentence of s. 17 of the Code.

CIVIL REVISIONAL.

1885
June 15.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SURAJPAL SINGH AND OTHERS (PETITIONERS) *v.* JAIRAMGIR (OPPOSITE PARTY)*.

Small Cause Court suit—Suit for enforcement of hypothecation against moveable property—Act XI of 1865 (*Mufassal Small Cause Courts Act*), *s.* 6.

A suit was brought in a Small Cause Court to recover a sum of money from the defendants personally, and by enforcement of hypothecation of certain cattle by their attachment and sale. The cattle were in the hands of other persons, who had purchased them at an auction-sale in execution of a decree against the original defendants, and who were added as defendants under s. 32 of the Civil Procedure Code.

Held that the suit was not cognizable by a Small Cause Court, inasmuch as it did not fall under the category of a "suit for money due on a bond or other contract," or of a "suit for personal property, or for the value of such property," within the meaning of s 6 of the Mufassal Small Cause Courts Act (XI of 1865). *Ram Gopal Shah* v. *Ram Gopal Shah* (1) and *Godha v. Naik Ram* (2), referred to.

THE facts of this case are sufficiently stated, for the purposes of this report, in the judgment of the Court.

Pandit *Sundar Lal*, for the petitioners.

The opposite party was not represented.

STRAIGHT and TYRRELL, JJ.—This was an application, under s. 622 of Act XIV of 1862, for the revision of an order passed by the Small Cause Court Judge of Mirzapur, on the 6th January, 1885, and the applicants before us are the persons who were defendants in that suit. The plaintiff virtually sued to recover Rs. 117-9-0 from the defendants personally, and by enforcement of hypothecation of sixty-nine head of cattle by their attachment and sale. The cattle were in the hands of defendants Nos. 3 to 5, who were added as defendants under s. 32 of the Code, and who had purchased them at an auction-sale held in execution of a decree against the original defendants.

It has been contended by the learned pleader for the applicants that the suit was not cognizable by the Small Cause Court, and

* Application No. 109 of 1885, for revision under s 622 of the Civil Procedure Code, of an order of Munshi Madho Lal, Judge of Small Cause Court of Mirzapur, dated the 6th January, 1885

(1) 9 W. R, 136. (2) *Ante*, p 152.

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that the decree of that Court must therefore be set aside for want of jurisdiction.

The question is a simple one to determine. S. 6 of the Small Cause Courts Act (XI of 1865) enumerates the various classes of suits cognizable by Small Cause Courts. We have to determine whether the present suit can fall under the category of a "suit for money due on a bond or other contract," or of a "suit for personal property."

Now, it is obvious that the suit contemplated in the first case is a suit for the recovery of a sum of money due on a bond, and it was never contemplated that a suit for enforcement of hypothecation against certain moveable property should fall under that category. The questions which might arise with reference to the enforcement of hypothecation might involve serious and difficult considerations which it was not contemplated should be tried by such Courts.

The observations of Sir Barnes Peacock, in *Ram Gopal Shah* v *Ram Gopal Shah* (1) on the point are very apposite; and we are of opinion that the relief sought in the shape of enforcement of hypothecation took the suit out of the jurisdiction of a Small Cause Court.

We have now to consider whether this suit can be said to be a suit for personal property or the value of personal property. It cannot be said that the cattle belonged to the plaintiff. The plaintiff does not claim to obtain possession of the cattle or to recover their value. The cattle had been attached and sold in execution of a decree, and purchased by the defendants Nos. 3 to 5, and the Court had no jurisdiction to hold the defendants liable to the extent of the value of the cattle in their hands. We may add that the principles laid down in *Godha* v. *Naik Ram* (2) apply to this case also.

The application must be allowed, and we set aside the decree of the Small Cause Court as against the defendants who were subsequently added under s. 32 of the Code, with proportionate costs in both Courts.

Application allowed.

(1) 9 W. R. 136. (2) *Ante*, p. 152.

APPELLATE CIVIL.

1885
June 24.

Before Sir W. Comer Petheram, Kt. Chief Justice, and Mr. Justice Tyrrell.

JAGRAM DAS (PLAINTIFF) *v.* NARAIN LAL (DEFENDANT)*

Civil Procedure Code, Chapter XV, ss. 191, 198—*Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor.*

A Subordinate Judge, having taken all the evidence in a suit before him, and having completed the hearing of the suit except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree.

Held that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides, and the arguments on behalf of both, and then finally decided the case which he had himself heard and tried: that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor to be put in; and that, in neglecting to take this course, and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities.

THE facts of this case are sufficiently stated, for the purposes of this report, in the judgment of Petheram, C. J.

Messrs. *T. Conlan* and *A. H. S. Reid*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambar Nath*, and Munshi *Kashi Prasad*, for the respondent.

PETHERAM, C. J.—I am of opinion that this appeal must be allowed, and the cause remanded to the Subordinate Judge of Aligarh for trial, on the ground that the cause has never really been tried, and that the papers before us, which purport to be a judgment and a decree, cannot properly be so called. The facts of the case are as follows:—Maulvi Samiullah Khan was the subordinate Judge of Aligarh, and the present suit was instituted in his Court, and the proceedings went on in a perfectly regular and proper manner until the hearing of the case under the provisions of Chapter XV of the Civil Procedure Code. A day was fixed under that chapter for the hearing before Maulvi Samiullah Khan, and

* First Appeal No. 146 of 1884, from a decree of Rai Cheda Lal, Subordinate Judge of Aligarh, dated the 10th September, 1884.

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the cause came on before him. The plaintiff's counsel opened his case and called witnesses to prove it, who were cross-examined by counsel for the defendant. After this, the defendant's counsel called his witnesses, and they were cross-examined by the other side. All that remained was for the plaintiff's counsel to sum up and for the defendant's counsel to reply. At this point Maulvi Samiullah Khan was sent on a special mission to Egypt, and another Subordinate Judge, named Rai Cheda Lal, was appointed to officiate in his place, and the present case came before him among others which were pending in his Court. His business was to try the case according to law; and if he did not so try it he had no jurisdiction to try it at all. All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing under Chapter XV of the Code. He should have fixed a day for the entire hearing of the suit before himself, and, in that case, the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191 of the Civil Procedure Code, which enacts that a Judge, in the hearing of a cause which was partly heard by another, may allow the evidence which was previously taken, to be used before himself. If he had taken that course, the trial would have been perfectly regular, and if, upon the day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff, and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection. But he did nothing of the kind. He fixed no date for the hearing of the case as for a new trial; but he practically arranged that it should be heard from the point at which his predecessor left off. In my opinion, this was an absolutely illegal course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code. The only power given by the Code is to allow the evidence taken at the abortive trial to be used as evidence at the new trial.

The law nowhere says that the two hearings may be linked together and virtually made one. That this was not the meaning of the Legislature is shown by s. 199 of the Code, which occurs in Chapter XVII, relating to judgment and decree. That section provides that a Judge who has not heard the case may pronounce the judgment of his predecessor who has heard it, if the judgment is written and signed by him That shows the intention of the Legislature to have been that the case should be heard by one Judge, and that the judgment should be that of the Judge who has heard the case, though it may be delivered by another. There is nothing to show that a Judge may decide a case upon materials which have never been before him. I am therefore of opinion that the judgment and decree in this suit are absolute nullities, and that therefore the appeal must be allowed, and the cause remanded to the Subordinate Judge, who will fix a day and re-hear it from beginning to end

I am glad to have an opportunity of expressing my disapproval of any system which makes it possible for a man to decide a case upon materials which are not before him. It may be said that these observations are applicable to the proceedings of an appellate Court, which is obliged to decide questions of fact upon evidence which it has not itself heard. But it must be remembered that the appellate Court has the advantage of the judgment of the Judge of first instance, who had the evidence before him. It is probable that the Subordinate Judges themselves will be glad to be told that they are not to decide questions upon which they have not themselves taken the evidence; and it is obvious that such a course is not in accordance with the interests of justice.

The costs of all proceedings will be costs in the cause.

TYRRELL, J.— I am of the same opinion. It appears to me that the Subordinate Judge who gave the judgment in the case, without having heard a word of the evidence or the pleadings made by or on behalf of the parties, under Chapter XV of the Civil Procedure Code, cannot be taken to have been a Court competent to proceed to judgment upon evidence duly taken, and after having fully heard the parties, according to the terms of s. 198.

Cause remanded.

1885
June 29.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr Justice Brodhurst.

KARAN SINGH AND ANOTHER (PLAINTIFFS) *v.* MUHAMMAD ISMAIL KHAN AND OTHERS (DEFENDANTS)*

Pre-emption—Hindu widow—Joinder of plaintiffs, one of whom had no right to sue for pre-emption—Amendment of plaint.

The plaintiffs in a suit to enforce a right of pre emption based on the *wajib ul arz* of a village, which gave the right to "co sharers," alleged themselves to be jointly interested in the village, and, in their plaint, claimed relief jointly. One of the two plaintiffs was the widow of a co-sharer in the village, who, at the time of his death, was a member of a joint Hindu family.

Held that, inasmuch as the widow had only a right of maintenance out of the estate of her husband, she was not a co-sharer in the village, and therefore had no right to claim pre-emption.

Held further, with reference to the manner in which the plaint was framed, that the other plaintiff could not claim pre-emption entirely on his own account without amending the plaint, but that it was too late for him to take such a course. *Damodar Das* v. *Gokal Chand* (1) referred to.

THE plaintiffs in this suit were Karan Singh, the minor son of Desraj, deceased, and Musammat Lado, calling herself the widow of Balwant Singh, deceased, son of Desraj. Musammat Lado claimed in this suit, on her own behalf, and as the guardian of Karan Singh, to enforce a right of pre-emption in respect of the sale of a share in a village called Alahdadpur. The plaintiffs claimed under the *wajib-ul-arz* as "collateral co-sharers." It appeared that, on the death of her husband Balwant Singh, Musammat Lado's name was substituted for his in the revenue registers. It was denied by the vendees that Lado was the widow of Balwant Singh, and it was a point in dispute whether Balwant Singh had or had not pre-deceased his father Desraj.

The Court of first instance dismissed the suit on the ground that Lado had no right to sue, not being a "co-sharer," and Karan Singh had lost the right of pre-emption by associating with himself a person who was not a "co-sharer." The Court observed as follows :—

"In my opinion, the third point at issue is that which should be tried first. Lado's right of pre-emption cannot be admitted in any way, and she has no right whatever to the property owned by

* First Appeal No. 98 of 1884, from a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 17th March, 1884.

(1) *Ante*, p. 79.

Desraj. It is satisfactorily proved by the evidence on the record that Balwant, who is alleged to be the husband of Lado, died in the life-time of his father Desraj, hence the Musammat had no position; and, assuming that Balwant died after his father, Musammat Lado had no proprietary right to the property in the life-time of Karan Singh, nor was she a share-holder in the village, nor could she be a collateral. As to Balwant, it is alleged by the plaintiffs that he died after Desraj; but they do not say that he divided the property. If therefore the plaintiffs' own statement were admitted in respect of Balwant, Musammat Lado had no right to ancestral property left by Desraj, nor can she be the heir of Desraj under the Hindu Law. She is like a stranger, and even if she had been a woman whose possession during her life-time could have been admitted, she could not have claimed the right of pre-emption, as is evident from the case of *Dila Kuari* v. *Jagarnath Kuari* (1). Therefore, when the Musammat is a perfect stranger and has no concern with reference to the sold property, Karan Singh too has lost any right which he may be supposed to have had, by associating her with himself. In other words, when a claim has been brought in the names of two persons, one of whom is a 'stranger,' it cannot be decreed in the shape in which it has been brought. It would be inconsistent with sound principles to dismiss the claim of Lado and to maintain the claim of Karan Singh as valid, and to adjudicate upon it. This view is supported by the ruling in the case of *Bhawani Prasad* v. *Damru* (2)."

The plaintiffs appealed to the High Court. It was contended on their behalf, *inter alia*, that the lower Court had erred in holding that Lado had no right to sue, and that Karan Singh had lost the right of pre-emption by joining her as a co-plaintiff.

Pandit *Nand Lal*, for the appellants.

Pandit *Ajudhia Nath*, for the respondents.

PETHERAM, C. J.—I think that the appeal must be dismissed. The Judge has dismissed the suit upon the ground that one of the plaintiffs is not a co sharer in the village, and had no right to sue. The relief claimed in the plaint is a joint one, and one of the plain-

(1) Weekly Notes, 1883, p. 177. (2) I. L. R., 5 All. 197.

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tiffs cannot succeed without amending the plaint, and striking out the name of the other plaintiff. The facts upon which the judgment of the Judge is founded are as follows :—One of the plaintiffs, Musammat Lado, is the widow of one of the co-sharers of the village. Her husband at his death was a member of a joint Hindu family ; his widow, Musammat Lado, therefore, did not succeed to the estate of her husband, which was inherited by the other members of the family She had only a right of maintenance out of the estate of her late husband; she was therefore not a co-sharer in the village, and therefore had no right to claim pre-emption. She must, for the purposes of this suit, be regarded as a stranger.

Now, in the plaint, both the plaintiffs allege themselves to be jointly interested in the village, and they jointly claimed pre-emption. One of them, Musammat Lado, is not entitled to claim pre-emption, and the other plaintiff therefore cannot claim pre-emption entirely on his own account without amending the plaint. Under a Full Bench ruling of this Court—*Damodar Das* v. *Gokal Chand* (1), the plaint cannot be amended at this time of day : with the petition of plaint as it now stands, the plaintiffs cannot succeed. The appeal is dismissed with costs.

BRODHURST, J.—I am of the same opinion.

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* DAN SAHAI.

Criminal Procedure Code, s. 288—Trial before Court of Session—Evidence given before committing Magistrate used at trial to contradict witnesses.

S. 288 of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself. *Queen* v. *Amanulla* (2) referred to.

A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate, the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth.

(1) *Ante*, p. 79. (2) 12 B. L. R , App. 15.

In a case in which the Sessions Court had neglected to apply the above rules, STRAIGHT, J. quashed the conviction.

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QUEEN-EMPRESS v. DAN SAHAI.

IN this case two persons named Hansi and Dan Sahai were tried by the Officiating Sessions Judge of Mainpuri on a charge, under s. 304 of the Penal Code, of culpable homicide not amounting to murder. Both the prisoners were convicted. In the course of his judgment, the Sessions Judge made the following observations :—

"The statements of the witnesses, Kanahia, Tejraj, and Aman Singh differ from those made before the committing Magistrate in omission of Dan Sahai and accused's name. They state that Hansi alone was the assailant of the deceased .....The witnesses have evidently come into this Court with the intention of screening Dan Sahai, accused. The statements implicating him, made before the committing Magistrate, differ on this point, as already mentioned ; but, under s. 288 of the Criminal Procedure Code, I can use the statements made in the Magistrate's Court, and thereby defeat this conspiracy to defeat justice. That Dan Sahai was there I have no doubt His name has been mentioned all along from the very beginning in the magisterial proceedings, and he made the first report to the police."

The accused Dan Sahai appealed to the High Court. He was not represented.

The *Junior Government Pleader* (Babu *Dwurka Nath Banarji*), for the Court.

STRAIGHT, J.—The Judge has quite misunderstood the provisions of s. 288 of the Criminal Procedure Code. That section was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the Magistrate's record, as the Judge has done here, and to treat it as evidence before itself ; and I entirely concur in the remarks made on this head by Phear, J., in *Queen* v. *Amanulla* (1). At any rate, the Judge was bound to put to the witnesses he proposed to contradict by their former statements the whole or such portions of their depositions as he intended to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they

(1) 12 B. L. R., App. 15.

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had made any such statements, and so forth. The course adopted by the Judge was contrary to practice, and inconsistent with all the rules regulating the admissibility of evidence, and Phear, J., in the case mentioned above, has pointed out the mischief and dangers of such a mode of procedure.

Under the circumstances I cannot allow the conviction of Dan Sahai to stand, and, it being reversed, he is acquitted.

Conviction quashed.

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APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

RADHEY LAL AND OTHERS (PLAINTIFFS) *v.* MAHESH PRASAD AND ANOTHER (DEFENDANTS)*.

Extinguishment of charge—Equitable estoppel.

An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mortgagees obtained a decree upon their deed, and in execution thereof the property was attached and sold, and the decree-holders obtained possession The heirs of the mortgagor sued the decree-holders for recovery of possession and for arrears of the annuity, claiming under the terms of the grant.

Held that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unincumbered, he was bound to give it over to them free from incumbrance, and it would not lie in his mouth nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees.

IN 1844, one Shaikh Haidar Ali sold certain zamindari property to Sheikh Abdullah, the brother of his wife Musammat Zainab Bibi. As Zainab Bibi's dower was due, Abdullah, on the 8th March, 1844, executed in her favour an instrument whereby he promised to pay to her and her heirs, out of the income of the property purchased by him from Haidar Ali, an annuity of Rs. 100 down to the year 1862, and, after that year, of Rs. 200. It was stipulated that, in the event of failure by the grantor or his heirs to pay the said annuity, the property, out of the income

* First Appeal No. 139 of 1884, from a decree of Babu Abinash Chander Banerji Subordinate Judge of Allahabad, dated the 24th June 1884.

of which it was payable, should become the property of the grantee and her heirs, and they should be entitled to obtain possession of it. After the execution of this instrument, Abdullah remained in possession of the property, and paid the annuity. On the 5th June, 1868, he mortgaged the property to Mahesh Prasad and Partab Narain, the defendants in the present suit, by a deed in which he described it as his absolutely, and made no mention of the charge held upon it by Musammat Zainab Bibi. In March, 1873, the mortgagees obtained a decree on their deed against the mortgagor, and, in execution thereof, the property was attached and put up for sale, and was purchased by the decree-holders themselves, who obtained possession. On the 25th May, 1878, Musammat Zainab Bibi died, and Sheikh Abdullah survived her a few days only. The sons of the latter, who were the nephews and heirs of Musammat Zainab Bibi, sold half their rights to one Radhey Lal, by a sale-deed dated the 29th March, 1883.

The present suit was brought by Radhey Lal and the sons of Abdullah to recover possession of the property, and for Rs. 1,200 as arrears of the annuity from 1284 to 1289 fasli, claiming under the terms of the deed of the 8th March, 1844. The defendant pleaded (*inter alia*) that, upon the death of Musammat Zainab Bibi, the right to receive the annuity devolved upon the grantor and his heirs, and consequently merged and was extinguished, and could not now be enforced.

The Court of first instance dismissed the suit on the grounds, first that it was barred by limitation, and, secondly, that the charge was extinguished when the right to receive the annuity devolved upon Abdullah by inheritance from Musammat Zainab Bibi.

The plaintiffs appealed to the High Court.

Mr. *N. L. Paliologus* and Lala *Juala Prasad*, for the appellants.

Mr. *W. M. Colvin*, Munshi *Hanuman Prasad*, and *Ram Prasad*, and Babu *Oprokash Chander Mukarji* for the respondents.

PETHERAM, C. J.—I am of opinion that this appeal must be dismissed. The facts are, that one Shaikh Abdullah, being in possession of a certain property, made a grant from it of an

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annuity to his sister and her heirs, with a proviso that, in case of failure to pay the annuity, the grantee and her heirs should be entitled to take possession of the property. He paid the annuity and kept possession, and subsequently mortgaged the property to the present defendants, and, by the terms of the mortgage, declared that the property was absolutely his own, and that no other person had any interest in it. He remained in possession, and paid the annuity till his sister's death. He was then her heir, and therefore the whole right to the charge, and the right to possession in default of payment, vested in him.

The charge consequently merged and was extinguished, and as he had previously professed to transfer the property to the defendants unincumbered, he was bound to give it over free from incumbrance. The charge having been extinguished in his hands, he then had what he professed to have at the time when he executed the mortgage, and it would not lie in his mouth, nor in mouths of his two sons, to say that the charge was still existing, and could be set up against the mortgagees and their vendees. This would amount to taking advantage of his own fraud—a course which no Court of law would allow for a moment. I am therefore of opinion that the Subordinate Judge was right, and that the appeal must be dismissed with costs.

BRODHURST, J.—I am of the same opinion.

Appeal dismissed.

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FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

ABADI HUSAIN (PLAINTIFF), v JURAWAN LAL AND OTHERS (DEFENDANTS).*

Landh lder and tenant—Transfer of "right of occupancy"—Lease—Mortgage—"Zar-i peshgi" lease—Act XII of 1881 (*N-W. P. Rent Act*) *ss.* 8, 9.

The occupancy-tenants of certain land executed a *zar-i-peshgi* lease in favour of certain persons, by which, in consideration of a sum of money, it was agreed that the latter should have the right of occupying and cultivating the

* Second Appeal No. 950 of 1884, from a decree of Pandit Jagat Narain, Subordinate Judge of Farakhabad, dated the 14th April, 1884, reversing a decree of Maulvi Munir-ud-din Ahmad, Munsif of Kanauj, dated the 19th December, 1883.

occupancy-holding as tenants for a term of years at a nominal rent. In pursuance of this agreement, those persons obtained possession. The zamindar thereupon brought a suit against them for ejectment, and to have the *zar-i-peshgi* lease set aside.

Held by the Full Bench that the *zar-i peshgi* lease was a transfer of occupancy rights, within the meaning of s. 9 of the N.-W. P. Rent Act (XII of 1881), and was therefore invalid.

Per PETHERAM, C. J.—A right of occupancy means nothing but the right to live on and cultivate land as one's own.

Per STRAIGHT, J.—The last sentence of s. 8 of the Rent Act should not be read as declaring that any occupancy-tenant may sub-let his land, but that the scope of the proviso is limited to tenants who actually occupy or cultivate land under a written lease, without having acquired a right of occupancy. *Haji Hidayatullah* v. *Ram Niwaz Lal* (1), referred to.

THE occupancy-tenants of certain land, by name Pirthi and Bhabhuti, executed the following instrument in respect of their holding in favour of three persons, named Jurawan Lal, Manick Chand, and Ram Charan:—

"We, Pirthi and Bhabhuti....., do hereby declare that seven plots of field, numbered 71, 72, 79, 80, 82, 86, and 88, containing nine bighas and seventeen biswas of *pukhta* land, and paying a yearly rent of Rs. 70, in mauza Usufpur Bhagwan, are held by us from Abadi Husain, and that we, having taken Rs. 500 in advance (*peshgi*), have leased the said fields for cultivation, and given possession of them to Jurawan Lal, Manick Chand and Ram Charan, for twenty-two years, from 1291 fasli to 1313 fasli, with this detail, that half of them are given to Jurawan Lal and half to Manick Chand and Ram Charan. The said persons can either cultivate themselves or give the land to others for cultivation. After paying the rent due to the zamindar, they may appropriate the profits. After the expiration of the twenty-two years, the said persons shall surrender the cultivatory holding, and we shall not claim profits, nor shall the said persons have any claim in respect of the amount advanced (*zar-i-peshgi*) after the expiration of the said term. We have received the money as detailed below—half from Jurawan Lal and half from Manick Chand and Ram Charan. We have therefore executed this deed of *thika*, that it may be an authority, and be of use when needed."

(1) Weekly Notes, 1882, p. 80.

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This document was dated the 29th March, 1883, and was registered on the 17th April, 1883.

Abadi Husain, the zamindar, brought the present suit against the tenants and the persons in whose favour the above document was executed, to have the document set aside, and the latter persons ejected from the land. It was contended on his behalf that the document created a usufructuary mortgage of the land, and such a transfer was void under s. 9 of the N.-W. P. Rent Act, XII of 1881. For the defendants it was contended that the document created a lease only of the land, and such a lease was not a transfer within the meaning of s. 9. The Court of first instance held that the document created a usufructuary mortgage, and that the transfer was void under s. 9, and gave the plaintiff a decree, setting aside the document, and ejecting the transferees The lower appellate Court, on appeal by the defendants, held that the document created a lease only of the land, and that the transfer was not void under s 9 The Court therefore dismissed the suit.

The plaintiff appealed to the High Court. The appeal came for disposal before PETHERAM, C. J., and STRAIGHT, J., who referred it to the Full Bench for determination.

Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri* for the appellant.

Mr *T. Conlan*, Munshi *Hanuman Prasad*, and Pandit *Bishambar Nath*, for the respondents.

The following judgments were delivered by the Full Bench :—

PETHERAM, C.J. I am of opinion that this appeal should be allowed. The plaintiff is the zamindar of the village, and some of the defendants had an occupancy-holding in the village. They executed a document in favour of the other defendants, by which, in consideration of a particular sum of money, it was agreed that the latter should have the right of occupying and cultivating as tenants for a term of years at a nominal rent. In pursuance of this agreement, the original occupancy-tenants went out, and the persons who had advanced the money and taken the *zar-i-peshgi* lease, took possession, and are now in occupation and cultivation of the holding, either by themselves or through their servants. The zamindar now sues them for ejectment, alleging that they

are not his tenants. The defendants plead that they have the same right as the original occupancy-tenants had. The question is, whether the *zar-i-peshgi* lease has given the defendants such a right, and whether the zamindar is entitled to object to that transaction.

The determination of this question depends on s. 9 of the Rent Act, which provides that no right of occupancy, other than the right of tenants at fixed rates, "shall be transferable in execution of a decree, or otherwise than by voluntary transfer between persons in favour of whom, as co-sharers, such right originally arose, or who have become by succession co-sharers therein." The persons now in possession were not co-sharers with the persons from whom they obtained possession, so that the transfer to them cannot be considered a "voluntary transfer between persons in favour of whom, as co-sharers, such right originally arose." The question comes to this :—Is this transaction the transfer of a right of occupancy? And first—What does a right of occupancy mean?

I understand it to mean nothing but the right to live on and cultivate the land as one's own. That is what the original tenants possessed, and they have sold this right to live on the land for twenty years. I cannot follow the contention that this is not a transfer of the right of occupancy. It is a sale of that right, and therefore it is a transfer, and is prohibited by s. 9 of the Rent Act. No interest therefore passed under the transaction, and the persons now in possession have no right, and are trespassers against the plaintiff, who is entitled to eject them. I am therefore of opinion that the appeal must be allowed with costs, and the decree of the first Court restored.

STRAIGHT, J.—I am of the same opinion. I am by no means sure that the Court was wrong in holding that the document by which the sum of Rs. 500 was advanced, and the lenders placed in possession of the holding, was a mortgage in the sense of cl. (*d*), s. 58 of the Transfer of Property Act. It may, however, be more convenient to regard it as a lease in the sense of s. 105, which defines a lease of immoveable property as a "transfer of a right to enjoy such property under certain special conditions," so that, however the matter is looked at, the transaction was a "transfer,"

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and must be considered a transfer of a right of occupancy; o r, in other words, of a right to occupy the land in suit. Two rulings have been cited by the learned Pandit for the respondent. One of these is the case of *Haji Hidayatullah* v. *Ram Niwaz Rai* (1), in which it was held by the late Chief Justice and Oldfield, J., that a *zar-i-peshgi* lease in perpetuity was not a transfer within the meaning of s. 9 of Act XVIII of 1873, the N.-W. P. Rent Act then in force. It must, however, be remembered that the learned Judges who decided that case had not the provisions of the Transfer of Property Act (IV of 1882) to assist them by analogy. I confess that, looking at the terms of the judgment in that case, it appears to me that the learned Judges somewhat misapprehended the meaning of s. 8 of the Rent Act. I do not read the last sentence of that section as declaring that any occupancy-tenant may sub-let his land, but that the scope of the proviso is limited to tenants who actually occupy or cultivate land under a written lease, without having acquired a right of occupancy. In regard to a later unreported case, which was also referred to by the learned Pandit, and which was decided by Oldfield and Tyrrell, JJ., I can only say that, looking at the provisions of the Transfer of Property Act which I have mentioned, I am not able to concur in that ruling. Under all the circumstances, I am of opinion that this appeal should be decreed with costs, and the decree of the first Court restored.

BRODHURST, J.—I concur in the judgment of the learned Chief Justice.

TYRRELL, J.—Without entering upon the discussion of the question whether the interest in immoveable property, which is described in the first paragraph of s. 8 of the Rent Act, and known as a "right of occupancy," is the same interest as a right to the occupation of land referred to in the last paragraph of the same section, I concur in the opinion that the document in question in the present case was unquestionably one which operated as a "transfer," within the meaning of s. 9.

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(1) Weekly Notes, 1882, p 80.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

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ISHRI PRASAD *v* SHAM LAL.

Criminal Procedure Code, ss 195, 476—"*Sanction*"—"*Complaint.*"

On the 2nd August, 1884, a Munsif, who was of opinion that in the course of a suit which had been tried before him, certain persons had committed offences under ss. 193, 463, and 471 of the Penal Code, and that the prosecution of these persons was desirable, made an order which he described as passed under s. 643 of the Civil Procedure Code, and in which he directed that the accused should be sent to the Magistrate, and that the Magistrate should inquire into the matter. In May, 1885, upon an application by one of the accused to the District Court to "revoke the sanction for prosecution granted by the Munsif," it was contended that the "sanction" had expired on the 2nd February, 1885, and had ceased to have effect.

Held by the Full Bench that the Munsif's order, whether it was or was not a sanction, was a sufficient "complaint" within the meaning of s. 195 of the Criminal Procedure Code, and that the limitation period prescribed by that section was not applicable to the case.

Per PETHERAM, C. J., and STRAIGHT, J.—That considering that s 643 of the Civil Procedure Code was closely similar to s. 476 of the Criminal Procedure Code, the Munsif's order might be taken as having been passed under the latter section.

Also *per* PETHERAM, C. J., and STRAIGHT J.—The words in s. 195 of the Criminal Procedure Code, "except with the previous sanction or on the complaint of the public servant concerned," must be read in connection with s. 476, which was enacted with the object of avoiding the inconvenience which might be caused if a Munsif, or a Subordinate Judge, or a Judge, were obliged to appear before a Magistrate and make a complaint on oath, like an ordinary complainant, in order to lay the foundation for a prosecution. The language of s. 476 indicates that where *a Court* is acting under s. 195, a complaint in the strict sense of the Code is not required, and that the procedure therein laid down constitutes the "complaint" mentioned in s. 195.

THE facts of this case were as follows :—The Munsif of Jalesar, on the 2nd August, 1884, after recording a proceeding, in which he expressed his opinion that one Ishri Prasad, the plaintiff in a suit decided by him, had given false evidence, and had dishonestly used as genuine a forged document, and that certain witnesses produced by Ishri Prasad had given false evidence, and that one of such witnesses had committed forgery, made the following order :—"That the case be entered in the miscellaneous register under s. 643 of Act XIV of 1882, and Ishri Prasad, for punishment under ss. 193, 463, and 471 of the Indian Penal Code, Tulshi Ram and Kamlapat for punishment under s. 193 of the

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Indian Penal Code, and Sobha Ram patwari for punishment under ss. 193 and 463 of the Indian Penal Code, together with a copy of the proceeding of this Court, be sent to the Magistrate of Etah. A bail of Rs. 400 was asked for from Ishri Prasad, and a bail of Rs. 100 from each of Tulshi Ram, Kamlapat, and Sobha Ram, but they did not give it; hence the criminals in custody of the Jalesar police should be sent to the Magistrate of Etah. The Magistrate may also be requested to send for the evidence mentioned below for inquiry and finding on the aforesaid charges, and whatever proof is required the Court may be informed in respect thereof, and it will send it." On the 8th September, 1884, Ishri Prasad applied to the District Court to revoke the "sanction for prosecution granted by the Munsif under s. 195 of the Criminal Procedure Code." At the hearing of the application by the District Judge, it was contended for the applicant that the "sanction" expired on the 2nd February, 1885, and had ceased to have effect. On the 27th May, 1885, the District Judge rejected the application, holding that the Munsif did not merely sanction the prosecution, but himself instituted the complaint, and that s. 195 did not limit the period within which "complaints," as distinguished from "sanctions," should be made. Ishri Prasad subsequently received a summons from the Deputy Magistrate of Etah, to appear before the Court for inquiry into the charges preferred against him. He then applied to the High Court to revise the order of the District Judge and of the Munsif on the following grounds:—"(1) because the sanction given by the Munsif has expired; (2) because the Munsif held no preliminary inquiry as he was bound to do under the law; (3) because on the facts the sanction is improper."

The application was made before the Full Bench.

Mr. *C. Dillon*, for the applicant.

Mr. *J. Niblett*, for the opposite party.

The following judgments were delivered by the Full Bench:—

STRAIGHT, J.—The question raised by this reference is, whether the terms of the order of the Munsif, which was passed on the 2nd August, 1884, amounted to a "sanction" or to a "complaint" under s. 195 of the Criminal Procedure Code. It seems that in

the course of a suit which had been heard before him, and which had closed, the Munsif was of opinion that certain persons had committed offences under ss. 193, 463, and 471 of the Penal Code, and, having all the materials before him, he came to the conclusion that a prosecution should be instituted. He accordingly directed that they should be sent to the Magistrate of Etah under bail, and the Magistrate should inquire into the matter.

It is said on behalf of the persons prosecuted that the Munsif's order was a "sanction" and not a "complaint" under s. 195 of the Criminal Procedure Code. Upon this point I may observe that every such order must in a sense be a sanction, because it implies that the Judge wishes and authorizes that a prosecution should take place. The law does not require that the sanction should be expressed in any special terms. It need not (though it is desirable that it should) expressly name the person at whom it is directed so long as its meaning and intention are clearly shown. It does not appear to me that the order in the present case must necessarily be construed to be a sanction within the meaning of s. 195. The question then arises whether or not the order amounted to a "complaint." During the argument I intimated my opinion that the words in s. 195—"except with the previous sanction or on the complaint of the public servant concerned"—must be read in connection with s. 476, and s. 476 affords a clear indication of what was contemplated by the Legislature regarding the nature of the complaint of a Civil Court under s. 195. It is easy to imagine the inconvenience which might be caused if a Munsif, or a Subordinate Judge, or a Judge were obliged to appear before a Magistrate and make a complaint on oath in order to lay the foundation for a prosecution, and for this reason the Legislature thought it desirable that the procedure to be followed in case of complaint by a Court should be different from that which has to be observed by an ordinary complainant. S. 476 is in the following terms:—"When any Civil, Criminal, or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in s. 195, and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case

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for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such inquiry or trial." In the first place, there is here a distinct reference to s. 195, and therefore a complaint under that section must be shaped according to the provisions of s. 476. The Munsif in the present case did comply witb those provisions. It is true that he refers to s. 643 of the Civil Procedure Code, but I think that this circumstance is of no great importance; and that, considering that s 643 of the Civil Procedure Code is closely similar to s. 476, the order may be taken as having been passed under the latter section; and, looking at the matter in this way, I think that the Munsif's order, whether it was or was not a sanction, was a sufficient "complaint," and satisfied the requirements of the law under ss. 195 and 476. In my opinion the language of such last-mentioned section indicates that where *a Court* is acting under s. 195, a complaint in the strict sense of the Code is not required, and that the procedure therein laid down constitutes the complaint mentioned in s 195. This heing so, there is nothing to prevent the prosecution being proceeded with, and the Magistrate, with reference to the last paragraph of s. 476, should entertain and dispose of the matter.

PETHERAM, C. J.—I am of the same opinion.

BRODHURST, J.—The grounds for revision are, in my opinion, invalid. The Munsif's proceedings were taken under s. 643 of the Civil Procedure Code; no inquiry other than was made was required by law; and the limitation period referred to by s. 195 of the Criminal Procedure Code does not apply to this case.

The case would in all probability have been decided long ago, had it not been for the delay that occurred in the Judge's Court in disposing of the petitioner's application.

The District Judge's view of the law is correct, and his order is a proper one. I would reject the application.

TYRRELL, J.—Chapter XV of the Criminal Procedure Code lays down rules governing proceedings in prosecutions. Part *B* prescribes the "conditions requisite for initiation of proceedings."

S. 191 gives the general rule that "any" offence may come to the cognizance of the Criminal Court: (*a*) by complaint of individuals, (*b*) by police report, (*c*) or by other informations. But this rule is specially limited by s. 195, which prohibits the prosecution of certain specified offences, except (*a*) on the complaint of certain Courts, or (*b*) on sanction given to individuals by such Courts. In the latter case, the individual would proceed to lay his complaint under s. 191; in the other case, the Court contemplated by s. 195 would take action by way of "complaint," and the procedure to be followed by such Court is prescribed in Chapter XXV, s. 476, referred to by my learned brother Straight.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

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SURTA AND OTHERS (PETITIONERS) *v.* GANGA AND OTHERS (OPPOSITE PARTIES)*

Civil Procedure Code, s 206—Order amending decree—High Court's powers of revision.

A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say he accepted the appeal, and that the decree as it stood failed to give effect to the judgment.

Held by the Full Bench that an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under s. 588. Also that, in saying that by "dismiss," his predecessor had meant "decree," the Judge had altered the decree in a manner not warranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Code, and that the High Court was consequently competent to reverse his order.

The judgment of OLDFIELD, J., (1) reversed, and that of MAHMOOD, J., (1) affirmed.

THIS was an application by the plaintiffs in a suit, for revision, under s. 622 of the Civil Procedure Code, of an order amending the appellate decree in the suit, passed by the District Judge of Saharanpur. The application was heard by Oldfield and Mah-

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* Appeal No. 1 of 1885, under s 10, Letters Patent.

(1) *Ante*, p. 412.

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mood, JJ, and the facts of the case, and the judgments of the learned Judges, will be found reported at p. 411, *ante*. Their Lordships differed in opinion, Oldfield, J., holding that the application should be dismissed, on the ground that the Court had no jurisdiction to entertain it, and Mahmood, J., holding that it should be allowed. An appeal was preferred by the applicants to the Full Court, from the judgment of Oldfield, J., under s. 10 of the Letters Patent for the N.-W. Provinces.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

Babu *Ram Das Chakarbati* and Munshi *Ram Prasad*, for the respondents.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—For the reasons stated in the judgment of Mr. Justice Mahmood, I am of opinion that this application must be allowed with costs.

STRAIGHT, BRODHURST, and TYRRELL, JJ., concurred.

1885
July 4.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

RAGHUNATH DAS (PETITIONER) v. RAJ KUMAR (OPPOSITE PARTY) *

Civil Procedure Code, ss 206, 622—Order amending decree in respect of court-fee in pre-emption suit—High Court's powers of revision.

An order as to costs, contained in a decree for pre-emption, directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. Subsequently the Court, professing to act under s. 206 of the Civil Procedure Code, passed an order directing the amendment of the decree by calculating the pleader's fees upon the actual value of the property.

Held by the Full Bench that the alteration of the decree was improper, and was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code.

An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and such an order is not appealable under s. 588 of the Code. Such an order, therefore, can be revised by the High Court, under s. 622.

The judgment of OLDFIELD, J., (1) reversed, and that of MAHMOOD, J., (2) affirmed.

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* Appeal No. 3 of 1885, under s. 10, Letters Patent.

(1) *Ante*, p. 277. (2) *Ante*, p. 278.

IN this case, a decree in a suit to enforce a right of pre-emption was passed by the Subordinate Judge of Bareilly on the 24th March, 1884, and the order contained in that decree as to costs directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. On the 18th April, 1884, the defendant applied to the Court to amend its decree in regard to costs, on the ground that the pleader's fees should be calculated with reference to the actual value of the property to which the suit related. On the 6th May, 1884, the Court passed an order as follows:—"In pre-emption cases, fees should be calculated upon the actual value of the property, and not upon any other value. In preparing this decree, the value of the property was not regarded, and fees were computed on the amount of the claim. The decree should be corrected, and it is therefore ordered that the original decree be amended, and after the copy thereof has been amended, it may be returned to the applicant."

The defendant applied for revision of this order to the High Court. It was contended that the pleader's fees had been wrongly computed with reference to the actual value of the property, and that the amendment of the decree by the lower Court was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code.

The application came for hearing before Oldfield and Mahmood, JJ. The former learned Judge was of opinion that the High Court had no power to revise the order of the lower Court in this case, and that the application should therefore be dismissed. Mahmood, J., on the other hand, was of opinion that the Court was competent to revise the order, and that the order was not justified by the provisions of s. 206 of the Civil Procedure Code, and should be set aside as *ultra vires*. The judgments of their Lordships will be found reported at p. 277, *ante*.

Under s. 10 of the Letters Patent for the High Court, N.-W. Provinces, the applicant appealed to the Full Court from the judgment of Oldfield, J., on the ground that the order of the Subordinate Judge was open to revision by the High Court, and that it ought to be revised.

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RAGHUNATH DAS v. RAJ KUMAR.

Babu *Dwarka Nath Banarji* for the appellant.

Munshi *Sukh Ram* for the respondent.

The Full Bench (PETHERAM, C. J., and STRAIGHT, BRODHURST, and TYRRELL, JJ.) concurring with the judgment of MAHMOOD, J., allowed the application with costs to the petitioner.

1885 *July* 6.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

JHINGURI TEWARI AND OTHERS (PLAINTIFFS) *v.* DURGA AND OTHERS (DEFENDANTS) *

Act XVIII of 1873 (*N.-W. P. Rent Act*), *s.* 9—*Sale of occupancy-rights with zamindar's consent—Acceptance of rent by zamindar from vendees—Act IX of* 1872 (*Contract Act*), *ss.* 2, 23—*Estoppel—Act I of* 1872 (*Evidence Act*), *ss.* 115, 116.

Under a deed dated in 1879, the occupancy-tenants of land in a village sold their occupancy rights, and the zamindars thereupon instituted a suit for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants.

Held by the Full Bench that the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s 9 of Act XVIII of 1873.

Held also, that s. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendees were misled by the fact that the zamindars were consenting parties to the sale-deed; that they could not plead ignorance that the deed was unlawful and void; that it had not been shown that they acted upon the zamindars' agreement to take no action, so as to alter their position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale deed was invalid.

Held also that the zamindars having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court.

The judgment of OLDFIELD, J. (1) reversed, and that of MAHMOOD, J. (2) affirmed.

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* Appeal No. 4 of 1885, under s. 10, Letters Patent.

(1) *Ante*, p. 515. (1) *Ante*, p. 512.

UNDER a deed dated the 5th July, 1879, Gopal and Jai Ram, the occupancy-tenants of certain land in a village called Shikari-pur, sold their rights to Durga and Mahadeo, the defendants in this suit, for Rs. 700. The present suit was brought by the zamindars of the village, in July, 1883, for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land.

The Court of first instance (Munsif of Benares) dismissed the suit, on the ground that the plaintiffs had consented to the sale, and had recognized the vendees as tenants by accepting rent from them, and that Act XVIII of 1873 did not prohibit a sale of occupancy-rights made with the consent of the landlord. On appeal by the plaintiffs, the District Judge of Benares reversed the Munsif's decision, and decreed the claim. He did not, however, record any definite finding as to whether or not the plaintiffs had consented to or acquiesced in the sale. The defendants appealed to the High Court. The Court (Oldfield and Mahmood, JJ.) remitted issues for trial by the lower appellate Court, and from the findings upon those issues, it appeared that the plaintiffs had consented to the alienation, and had recognized the defendants as tenants.

On the case coming again before the Court, Oldfield, J., was of opinion that the decree of the lower appellate Court should be reversed, and that of the first Court restored, dismissing the suit with all costs. Mahmood, J., on the other hand, was of opinion that the decree of the lower appellate Court should be upheld so far as it declared the sale-deed to be void, and that the suit should be dismissed so far as the claim for ejectment was concerned, leaving the plaintiffs to their proper remedy in the Revenue Court. The judgments of their Lordships will be found reported at pp. 512 and 515, *ante*. The plaintiffs appealed, under s. 10 of the Letters Patent, to the Full Court, from the judgment of Oldfield, J.

Munshi *Hanuman Prasad* and Lala *Juala Prasad*, for the appellants.

Lala *Lalta Prasad*, for the respondents.

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JHINGURI TEWARI v. DURGA.

The following judgment was delivered by the Full Bench :—

PETHERAM, C. J., STRAIGHT, BRODHURST, and TYRRELL, JJ.—The order we propose to pass in this case is that proposed by Mr. Justice Mahmood, namely, "that the decree of the lower appellate Court should be upheld so far as it declares the sale-deed to be void, and that the suit should be dismissed so far as the claim for ejectment is concerned, leaving the plaintiff to his proper remedy in the Revenue Court."

The reasons for this order have been so fully explained in the judgment of Mr. Justice Mahmood, that is unnecessary for us to say more than that we agree with him.

1885 *July* 6.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Terrell.

SHEOBARAN (DEFENDANT) *v.* BHAIRO PRASAD AND OTHERS (PLAINTIFFS)*

Landholder and tenant—Suit by landholder for declaration of right to take land from occupancy-tenant for cultivation of indigo—Wajib-ul-arz—Act I of 1877, (*Specific Relief Act*), *s.* 42.

THE zamíndárs of a village sued an occupancy-tenant for a declaration of their right to maintain a custom which was thus recorded in the *wajib-ul-arz*:—"when necessary, one or two bighas out of the tenants' lands are taken with their consent (*ba khushi*) for sowing indigo." Upon the basis of this entry, they claimed to be entitled to take a portion of the occupancy-holding at a certain period of the year, for the purpose of cultivating indigo.

Held by the Full Bench that the word "*khushi*" used in the *wajib-ul arz* indicated that the land was only to be taken with the occupancy-tenant's consent, and the document created no right of the nature alleged, namely to take the land despite the tenant.

Per TYRRELL, J.—That the suit was not maintainable under the special provisions of the Specific Relief Act (I of 1877).

THE plaintiffs in this case, Bhairo Prasad Singh and Bageshar Singh, the zamíndárs of a village named Pipri, claimed a declaration of their right to take a portion of the cultivatory holdings of the tenants of the village for sowing indigo. The claim was based on custom. The defendant, by caste a *Lunia*, was an occupancy-tenant of land in the village. It appeared that the plaintiffs had

* Second Appeal No. 1141 of 1884, from a decree of G J Nicholls, Esq., Offg. District Judge of Azamgarh, dated the 12th June, 1884, affirming a decree of Kazi Muhammad Wais, Munsif of Azamgarh, dated the 20th March, 1884.

sown a part of his land with indigo seed, whereupon he had instituted proceedings against them in the Revenue Court, alleging illegal ejectment, and claiming to recover possession of the land ; and that he had, on the 17th September, 1883, obtained a decree for possession.

The plaintiffs produced in evidence of the custom the sixth clause of the fourth chapter of the *wajib-ul-arz* of the village, framed in or about the year 1870. The chapter was entitled "Rights of the tenants in general," and the clause was headed "Dues received by the proprietors of the village from the cultivating and non-cultivating tenants" It was in the following terms :—

"In this mahál, all the cultivating and non-cultivating tenants render services to us (zamíndárs) according to the custom of the country. Excepting Brahman and Chhatri tenants, all the cultivating tenants of low castes, Chamars and others, give one ploughman with a plough and bullocks in Asarh, and one in Kartik, and each tenant gives one basket of chaff. Those tenants who have sugarcane mills, give daily one pitcher of sugarcane. *When necessary, one or two bighas out of the tenants' lands are taken with their consent* (ba khushi) *for sowing indigo.*"

When the *wajib-ul-arz* was attested, the tenants were not present, and this gave rise to a case for the correction of the *wajib-ul-arz* between the zamíndárs and some of the tenants. This was decided by the Settlement Officer, by an order, dated the 23rd May, 1872, which maintained the wording of the *wajib-ul-arz* (sixth clause) in respect to the ploughing of the land and cultivation of indigo.

The Court of first instance decreed the claim. On appeal by the defendant, the lower appellate Court affirmed the decree. In reference to the sixth clause of the *wajib-ul-arz*, above set out, the Court made the following observations :—

"It is argued that the meaning of this passage is that, in this village (or pargana) it frequently, very generally, happens that, with the permission of the tenant, a zamíndár takes up a small portion of an occupancy as well as of a non-occupancy ryot's land to sow indigo, &c From this it is argued that the tenant can, when he likes, refuse permission, that, if the ryot pleases, he can stop

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the zamíndár and upset all his plans, prospects, and arrangements, and that the latter has no right to take the land. This custom is entered solemnly in the *wajib-ul-arz*, in the official record of village rights and customs. Such a meaning has never before been attached to the passage, and if this had been the true state of affairs, it was ridiculous to enter anything whatever about indigo cultivation, based on contract between the parties, in the *wajib-ul-arz*. It would have no more practical meaning than if the Settlement Officer had entered :—'In this village, the zamíndárs blow their noses if they have pocket-handkerchiefs.' The words '*ba khushi*' in this place are surplusage, except in as far as they record a pleasant historical fact that, up to 1872 A.D., the ryots had not objected to the custom, and the zamíndárs had not given them cause to object to it."

The defendant appealed to the High Court, upon the following grounds :—

"(1). The decision is bad in law, as the Civil Court had no jurisdiction to set aside the decree passed by the Revenue Court, whereby the appellant recovered possession of his holding.

(2). The decision is bad in law, as the alleged custom is neither proved, nor such as would be recognized and enforced by the Civil Court.

(3). The entry in the *wajib-ul-arz* is not binding on the appellant, who had successfully objected thereto when that document was prepared ; moreover, the lower Courts have placed a wrong construction on its terms."

The Divisional Bench (Petheram, C. J., and Straight, J.), before which the appeal came for hearing, referred it to the Full Bench.

Lala *Juala Prasad*, for the appellant.

Munshi *Kashi Prasad*, for the respondents.

The following judgments were delivered by the Full Bench :—

STRAIGHT, J.—The plaintiffs in this case, who are zamíndárs, sue the defendant, who is an occupancy-tenant, for a declaration of their right to maintain a custom contained in the sixth clause, fourth head, of the *wajib-ul-arz*. The material portion of that document is as follows :—" When necessary, one or two bighas

out of the tenants' lands are taken with their consent for sowing indigo." Upon the basis of this, the plaintiffs claim to be entitled to take 16 biswas and 9 dhurs out of the occupancy-holding at a certain period of the year for the purpose of cultivating indigo. In other words, they claim that, notwithstanding the occupancy-tenancy, they may go upon the holding when they please, and plant and grow indigo there, and may oust the tenant for the time being.

If I were asked whether I, sitting here as a Judge, should countenance a custom of this kind, I should reply that I regard such a custom as preposterous, and such as no Court of law should recognize. It is unnecessary, however, to deal with the case upon this ground, because the term "*khushi*" used in the *wajib-ul-arz*, indicates that the land is only to be taken with the occupancy-tenant's consent, and the document creates no such right as that alleged, which is to take the land despite the tenant. It has been suggested that, under the further order of the Settlement Officer in reference to this claim, the position of the parties was altered. I do not concur in this view. The order must be taken in connection with the earlier clause of the *wajib-ul-arz*, and the words which show the necessity of the tenant's consent being obtained must take effect. I will only add that I am unable to follow the reasoning of the District Judge, much of which appears to be irrelevant in presence of the word *khushi* in the *wajib-ul-arz;* while the analogy which he employs to illustrate his observations in reference to this word is somewhat out of place in the judgment of a Court of justice.

I am therefore of opinion that the alleged custom has not been established, and that it is not contemplated by the *wajib-ul-arz*. The appeal must be decreed with costs, and the suit dismissed with costs.

BRODHURST, J.—I am of the same opinion.

TYRRELL, J.—I am of the same opinion. It appears to me that the suit is open to objection on the further ground that it is not maintainable under the special provisions of the Specific Relief Act. Its object is to obtain a declaration that a custom prevails in this village which enables the landlord to take land for the purpose of cultivating indigo. No other relief is expressly

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sought, but the real object aimed at is the temporary ejectment of the occupancy-tenant. The suit is one which, professing to be based on custom, and on the good-will and consent of all concerned, seeks to force the custom upon a most unwilling tenant, who has successfully resisted the landlord in the Revenue Court.

PETHERAM, C. J.—I am of the same opinion.

APPELLATE CIVIL.

1885 *July* 8

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Straight.

RAM SARUP AND ANOTHER (PLAINTIFFS) *v.* RUKMIN KUAR AND OTHERS (DEFENDANTS)*

Suit to set aside a decree on the ground of fraud—Act I of 1877 (*Specific Relief Act*), *s* 42.

Subsequent to a decree for partition of an ancestral estate the creditors of one of the parties thereto who, from the time of the suit, had borrowed money from them on the security of his rights and interests in the estate, brought a suit against their debtor and obtained a decree for the monies due to them. They then sued all the parties to the partition for a declaration that the decree then passed was, so far as it affected their (the plaintiffs') interests, fraudulent and collusive, and of no effect.

Held, that the suit was not maintainable.

THE facts of this case were as follows:—One Jai Singh had two wives. By his first wife he had a son called Beni Singh, and by his second, two sons called Dammar Singh and Shib Sahai. Beni Singh sued his father for partition of a moiety of the ancestral estate of the family, and obtained a decree.

This decree was followed by a partition of the estate between him and his father. Subsequently Rukmin Kuar, the wife of Beni Singh, sued her husband and her minor sons, for a one-third share of the estate, on the ground that she was entitled to such share on partition. On the 27th July, 1883, she obtained a decree for a one-fifth share of the estate, that is to say, to an equal share with her husband and his three sons.

From the time Beni Singh sued his father for partition, he commenced to borrow money from the plaintiffs in the present suit,

* Second Appeal No. 1263 of 1884, from a decree of A. F. Millett, Esq., District Judge of Shâhjahânpur, dated the 12th May, 1884, reversing a decree of Mirza Abid Ali Beg, Subordinate Judge of Shâhjahânpur, dated the 25th January, 1884.

Ram Sarup and Behari Lal, on the security of his rights and interests in the estate. In November, 1883, the plaintiffs obtained a decree against him for the monies due to them. They then brought the present suit against him, Jai Singh, Rukmin Kuar, Dammar Singh and Shib Sahai, to have it declared that the decree which Rukmin Kuar had obtained on the 27th July, 1883, was, so far as it affected their interests, fraudulent and collusive, and of no effect. The Court of first instance gave the plaintiffs a decree. On appeal by all the defendants excepting Beni Singh, the lower appellate Court dismissed the suit, on the ground that it was not established that Rukmin Kuar's decree had been obtained by fraud and collusion. Both the Courts held that the suit was maintainable, being of opinion that that decree was a sufficient ground for the admission of a suit under s. 42 of the Specific Relief Act.

In second appeal, it was contended for the plaintiffs that the lower appellate Court had wrongly decided that the decree of the 27th July, 1883, had not been obtained by fraud and collusion.

Pandit *Bishambar Nath*, for the appellants.

Mr. *T. Conlan* and Babu *Dwarka Nath Banerji*, for the respondents.

PETHERAM, C. J.—I think that this appeal must be dismissed with costs. The action was brought to set aside a decree which was passed in a Court of competent jurisdiction, and which could have been appealed, and was subject to be set aside if wrong. If the decree in the first suit was wrong, it was one that was subject to appeal as between the parties. If the decree was between other parties, and was obtained by fraud, that fraud may be subject of a suit when it has affected the rights of persons other than the parties to the fraudulent decree. I cannot see how a suit of this kind will lie. S. 42 of the Specific Relief Act does not authorize it, nor does any other law or rule.

The learned Judge was right in deciding as he did, and this appeal must be dismissed with costs.

STRAIGHT, J.—I concur in the order of the learned Chief Justice that this appeal must be dismissed with costs.

Appeal dismissed.

1885
July 9.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

IMTIAZ BEGAM AND OTHERS (DEFENDANTS) *v.* LIAKAT-UN-NISSA BEGAM (PLAINTIFF.) *

Act XXIII of 1871 (*Pensions Act*), *s.* 12—*Assignment of pension before passing of Act.*

On the 12th February, 1865, *A*, who was in receipt of a *zihakhi* pension from Government, assigned by deed a portion thereof to his wife, in lieu of her dower. After his death, disputes arose between the wife and the heirs of *A* in regard to a portion of the amount thus settled on her; and she instituted a suit, on a certificate granted by the Collector under s. 6 of the Pensions Act (XXIII of 1871), in which she prayed for a declaration of her proprietary right in respect of the said money and of her power to transfer the same.

Held, that the assignment of the 12th February, 1865, having been made before the passing of the Pensions Act, was not invalidated by s. 12 of that Act, which had no retrospective operation.

The former judgment of the Court in this appeal (1), reversed.

THIS was an appeal which was heard and determined in favour of the appellant by the High Court on the 14th July, 1884, and the facts of the case and the judgment of the Court will be found reported in I. L. R., 6 All. 630. At the hearing of the appeal, the respondent did not appear. An application was subsequently made on her behalf, under s. 560 of the Civil Procedure Code, for the re-hearing of the appeal, on the ground that she was prevented by sufficient cause from attending when the appeal was called on for hearing on the former occasion. The Court passed an order granting the application, and the appeal came on for re-hearing.

Mr. *Amiruddin*, for the appellant.

Mr. *W. M. Colvin* (with him Pandits *Ajudhia Nath* and *Bishambar Nath*) for the respondent, contended that, as the deed of the 12th February, 1865, which was an assignment of Rs. 8 out of a *zihakhi* pension from Government of Rs. 17-12-11 per mensem, in favour of the plaintiff in the suit, in lieu of her dower, and upon which her title was based, was executed at a date prior to the passing of the Pensions Act (XXIII of 1871), the provisions of s. 12 of that Act did not apply to the case, and the assignment was

* Second Appeal No. 125 of 1884, from a decree of Pandit Jagat Narain, Subordinate Judge of Farakhabad, dated the 3rd January, 1884, affirming a decree of Maulvi Zakir Husain, Munsif of Farakhabad, dated the 26th September, 1883.

(1) I. L. R., 6 All 630.

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therefore valid. On this ground, he submitted that the former judgment of the Court should be reviewed and set aside.

STRAIGHT and BRODHURST, JJ.—There is no doubt that the former decision of this Court is open to the objection now urged by the counsel for the respondent, who did not appear on the first trial of the appeal; and it is clear to our mind that s. 12 of Act XXIII of 1871 has no retrospective operation, so as to invalidate assignments made before the passing of such Act. There is nothing in it to show that it was intended to interfere with rights vested, or interests acquired, and, unless there are clear words to show that it was, we are, according to a well-understood canon of construction of statutes, bound to infer to the contrary, and not to give it retrospective operation. The technical difficulty thus being cleared out of the plaintiff's way, we think that the lower Courts properly decreed her suit, and in this view of the matter we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1885 *July 9.*

RUP SINGH AND ANOTHER (JUDGMENT-DEBTORS) *v.* MUKHRAJ SINGH (DECREE-HOLDER).*

"Decree"—Order rejecting memorandum of appeal for deficiency of court-fee—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (2).

An appeal from a decree dated the 8th July, 1879, was rejected by the High Court on the 11th June, 1880, in consequence of the failure of the appellants to pay additional court-fees declared by the Court to be leviable. On the 23rd December, 1882, an application was filed by the decree-holder for execution of the decree.

Held, with reference to Act XV of 1877 (Limitation Act), sch. ii, No. 179 (2), that the order of the 11th June, 1880, rejecting the appeal on the ground of deficient payment of court-fee, was equivalent to a decree, and therefore the application, being made not more than three years from the date of that order, was not barred by limitation.

In this case, an application was filed in the Court of the officiating District Judge of Aligarh, for execution of a decree dated the 8th July, 1879. The application was presented on the 23rd December, 1882, *i. e.*, upwards of three years from the date of the decree. It appeared that an appeal from the decree was presented by the judgment-debtors to the High Court, but the appeal

* First Appeal No. 96 of 1885, from an order of R. S. Aikman, Esq., Offg. District Judge of Aligarh, dated the 7th April, 1885.

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was rejected on the 11th June, 1880, in consequence of the failure of the appellants to pay additional court-fees declared by the High Court to be leviable.

The District Judge was of opinion that the decree-holder was entitled to claim that limitation for execution of the decree should run from the 11th June, 1880, the date of the order of the High Court rejecting the appeal. The Court referred to the case of *Ajudhia Pershad* v. *Ganga Pershad* (1) in which it was held that an order rejecting a plaint as insufficiently stamped was a "decree," and was of opinion that, for the same reasons, an order rejecting a memorandum of appeal for deficient payment of court-fee should be held to be a "decree" of the appellate Court. It accordingly held that the application for execution was within the period of limitation prescribed by Act XV of 1877, sch. ii, No. 179 (2).

The judgment-debtors appealed from this decision to the High Court.

Munshi *Sukh Ram* for the appellants.

Babu *Jogindro Nath Chaudhri* for the respondent.

BRODHURST and TYRRELL, JJ.—The order made in this case by the Judge of this Court, exercising jurisdiction in respect of the registering of appeals which are challenged on the ground of deficient payment of the court-fees required by law, is equivalent to a decree, and therefore the decree-holder has rightly been held to be within time in making his present application, which is not more than three years from the date of that order.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1885 *July* 13.

BAIJNATH (PLAINTIFF) *v.* LACHMAN DAS AND ANOTHER (DEFENDANTS)*.

Registered and unregistered documents—Mortgagee under registered deed not entitled to priority over holder of subsequent decree on prior unregistered deed—Act III of 1877 (*Registration Act*), *s.* 50.

The mortgagee under an unregistered hypothecation bond, of which the registration was optional, obtained a decree thereon, and, in execution of such decree, attached the hypothecated property.

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* Second Appeal No. 1356 of 1884, from a decree of J. C. Leupolt, Esq., District Judge of Moradabad, dated the 20th June, 1884, modifying a decree of Babu Banwari Lal, Munsif of Bilari, dated the 14th December, 1883.

(1) I. L. R., 6 Calc. 249.

Held, with reference to the terms of s 50 of the Registration Act (III of 1877) that the bond, having merged in the decree, was entitled to take effect against a registered bond relating to the same property, and which was executed subsequently to the unregistered bond, but prior to the decree *Kanhaiya Lal* v. *Bansidhar* (1) and *Shahi Ram* v. *Shib Lal* (2) distinguished.

THE facts of this case were as follows:—Two persons named Bansidhar and Shankar Das, by an unregistered bond dated the 27th December, 1878, hypothecated a house of value less than Rs. 100 to Bhagwan Das and Lachman Das, who, on the 21st July, 1882, obtained a decree upon the bond, and subsequently attached the hypothecated property in execution of the decree. Bansidhar, by a registered bond dated the 27th January, 1880, hypothecated the same house to one Baijnath. The latter brought a suit on his bond against the decree-holders and Shankar Das, heir of Bansidhar, to recover the sum of Rs. 145, principal and interest, and to have it declared that his deed, being registered, was entitled to preference over the unregistered deed of Bhagwan Das and Lachman Das, and alleging that the decree of the 21st July, 1882, had been fraudulently and collusively obtained by the defendants. The Court of first instance found that the decree was not fraudulent or collusive, and decreed the claim, observing as follows:—"As the bond in favour of the plaintiff was executed on the 27th January, 1880, and was registered, it took precedence of the bond dated the 27th December, 1878, as regards the hypothecated house, and the latter became inoperative against the property; and hence the decree passed on the 21st July, 1882, in favour of the defendants, on the basis of that ineffectual bond, can have no preference over the plaintiff's bond. Had the decree been passed before the 27th January, 1880, *i.e*, before the execution of the bond in favour of the plaintiff, the plaintiff's registered bond would have had no preference over the decree. But the decree was passed when the bond in favour of the defendant had become ineffectual by reason of the plaintiff's registered bond, and when the debt due to the plaintiff had become preferable." In support of this view, the Court referred to the case of *Madar* v. *Subbarayalu* (3).

The defendant appealed to the District Judge of Moradabad, who reversed the Munsif's decision. The Court observed:—"The

(1) Weekly Notes, 1882, p 15. (2) Weekly Notes, 1884, p. 136.
(3) I. L. R., 6 Mad 88.

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defendant-appellant in appeal urges that the Judges of the High Court, Allahabad, whose rulings this Court is bound to follow, do not agree with the Madras High Court's rulings—see *Parshadi Lal* v. *Khushal Rai* (1) This is entirely opposed to the Madras ruling. Secondly, the respondents' unregistered deed is now merged in their decree, and by the wording of s. 50 of Act III of 1877, the plaintiff's registered deed cannot affect their decree. It seems to me that the High Court of these Provinces does not entirely agree in its view of s. 50 with the Madras High Court. In the precedent referred to, a decree on the basis of a registered bond was not given preference over a decree on the basis of an unregistered bond; much less then can a mere registered bond take preference over a decree on the basis of an unregistered bond. I find therefore in favour of the appellant, that the plaintiff's registered bond is not to have preference over the appellant's decree."

The plaintiff appealed to the High Court. It was contended on his behalf that the judgment of the lower appellate Court was wrong, inasmuch as it was founded on the ruling of the High Court in *Parshadi Lal* v *Khushal Rai* (1), which was reconsidered in *Kanhaiya Lal* v. *Bansidhar* (2), and was no longer law.

Babu *Ratan Chand*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

BRODHURST and TYRRELL, JJ.—The case of *Kanhaiya Lal* v. *Bansidhar* (2) differs in essential respects from the present case. In it the defendant held not only the registered document, but also a prior decree based on it. Again the case of *Shahi Ram* v. *Shib Lal* (3) is inapplicable, for in it the rival parties held contemporaneous decrees. In the case before us, the defendants had attached in execution the property in question under a good decree they had obtained on an unregistered bond; and the plaintiff brought this suit on a registered bond affecting the attached property, seeking for a decree on his registered bond, and a declaration that the defendant's decree should not operate against the property, because it was fraudulent and collusive. It has been found, and is admitted, that this decree was not false, collusive or otherwise bad, but it is contended that the plaintiff's registered

(1) Weekly Notes, 1882, p 15. (2) Weekly Notes, 1884, p 136.
(3) Weekly Notes, 1885, p 63.

instrument must prevail under s. 50 of the Registration Act against that of the defendant. This would be so if that instrument had not at the time of the plaintiff's suit been merged in a decree. The words "not being a decree or order" in the section in question are conclusive against the plaintiff's claim to get the declaration he sought in his suit. The appeal is dismissed with costs.

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Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.

1885 *July* 17.

SHIB SHANKAR LAL (PLAINTIFF) *v.* BANARSI DAS (DEFENDANT) *

Act XII of 1881 (*N-W. P. Rent Act*), s. 93 (*h*)— "*Recorded co-sharer.*"

Held that a co-sharer of a mahal whose share was recorded in "*shamilat*" with all the other pattidars, but was not specifically defined in the *khewat* in a fractional or separate form, was a "recorded co-sharer", within the meaning of s 93 (*h*) of the N.-W. P. Rent Act (XII of 1881).

On the 12th July, 1882, the arbitrators appointed to divide a mahal among several co-sharers, awarded a one-fifth share to the plaintiff in this case, Shib Shankar Lal. He contested the award in the civil Courts, but it was eventually upheld. On the 1st December, 1883, he was recorded in the *khewat* as owner of a one-fifth share of the mahal The present suit was brought by the plaintiff under s. 93 (*h*) of the N.-W. P. Rent Act (XII of 1881) in respect of profits which became due on the 1st July, 1883. Both the Court of first instance (Assistant Collector of Etáwah) and the lower appellate Court (officiating District Judge of Mainpuri) dismissed the claim, on the ground that the plaintiff was not a "recorded sharer" of the mahal, within the meaning of s. 93 (*h*) of the Rent Act, at the time when the profits sued for became due, and he was therefore not competent to maintain the suit. The plaintiff appealed to the High Court. It was contended on his behalf that, at the time of the institution of the suit, he was a recorded co-sharer, within the meaning of the section, though his share had not been specifically defined.

Munshi *Hanuman Prasad*, for the appellant.

Babu *Ratan Chand*, for the respondent.

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* Second Appeal No 1398 of 1884, from a decree of H G Pearse, Esq, Offg. District Judge of Mainpuri, dated the 18th June, 1884, affirming a decree of F. Gray, Esq, Assistant Collector of Etáwah, dated the 10th May, 1884.

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SHIB SHANKAR LAL v. BANARSI DAS.

PETHERAM, C. J., and TYRRELL, J.—The plaintiff sues in the Revenue Court for a one-fifth share in certain profits of a village, which were divisible on the 1st July, 1883. The defendant-lambardar resists the claim, on the ground that the plaintiff was not recorded as a recorded co-sharer on the 1st July, 1883. The Judge and the Assistant Collector allowed this contention, and dismissed the plaintiff's suit; but this is an erroneous view of s. 93 (*h*) of the Rent Act. In July, 1883, the plaintiff was a recorded co-sharer, though his share was not specifically stated. The plaintiff was recorded in "*shamilat*" with all the other pattidars.

This is an entry of a share of a co-sharer amounting to an interest within the meaning of s. 93 (*h*). The lower Courts have wrongly held that, because this interest was not specifically defined in a fractional or separate form the suit would not lie. The order of the lower appellate Court is reversed, and this appeal decreed, and the case remanded, under s. 562 of the Code, for a decision on the merits. The costs of this appeal to be costs in the cause.

Cause remanded.

1885 *July* 17.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.

AJUDHIA BAKHSH SINGH (DEFENDANT) *v.* ARAB ALI KHAN AND OTHERS (PLAINTIFFS).*

Pre-emption—Right pleaded in defence to suit for possession by purchaser of co-sharer's rights and interests.

A co-sharer of a village, who is in possession, cannot plead the existence of a right of pre-emption in defence to a suit for possession by the purchaser of the rights and interests of another co-sharer.

ONE Zaman Khan died in 1878, leaving a share in a village called Pauri, and another share in a village called Madhopur. He had three sons named Murtaza Khan, Sadik Khan, and Ali Muhammad Khan. In execution of a decree, dated the 2nd September, 1879, in favour of one Muhamdi Khanam, against Murtaza Khan and Sadik Khan as heirs of Zaman Khan, the rights of the judgment-debtors in Pauri were sold; and in execution of a decree in favour of one Arab Ali Khan, their rights in Madhopur were sold. In each case the property attached was described as the

* Second Appeal No 1278 of 1884, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 1st August, 1884, affirming a decree of F. S. Bullock, Esq., Subordinate Judge of Allahabad, dated the 15th December, 1883.

property of Zaman Khan in the possession of Murtaza Khan and Sadik Khan, sons and heirs of Zaman Khan. In both sales, one Ajudhia Bakhsh Singh was the purchaser, and he took possession of all the rights and interests of Zaman Khan in both villages. Throughout these proceedings no mention was made of Ali Muhammad Khan, third son of Zaman Khan, and who was a minor. On the 27th May, 1883, Ali Muhammad Khan sold his rights in the villages Pauri and Madhopur to the plaintiffs in this case, who brought the present suit to recover possession from Ajudhia Bakhsh Singh. The defendant pleaded—(1) that the whole of Zaman Khan's estate was liable to sale, and was, in fact, sold in execution of the decrees passed in favour of Muhamdi Khanam and Arab Ali Khan; (2) that he (the defendant) as a co-sharer had a right of pre-emption in the two villages, which he was entitled to set up in answer to the claim; and (3) that the sale of the 27th May, 1883, was collusive and without consideration.

The Court of first instance (Subordinate Judge of Allahabad) and the lower appellate Court (District Judge of Allahabad) found that Ali Muhammad Khan's share was not sold in execution of the decrees of Muhamdi Khanam and Arab Ali Khan; and, holding that the right of pre-emption could not be pleaded by the defendant as an answer to the plaintiff's claim, decreed the suit.

In second appeal, the plea as to pre-emption was again raised on behalf of the defendant.

Babu *Dwarka Nath Banarji*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

PETHERAM, C. J.—I think that we cannot interfere in this case. The only question which we have to decide is, whether the existence of a right of pre-emption in a person who is a co-sharer in possession enables him to resist an action for possession by the purchaser of the rights of another co-sharer. Before a right of pre-emption can be claimed, several things, such as tender of the price and refusal, must be alleged. The argument that the plaintiff has not paid the price is not one that helps the appellant. If he has a right of pre-emption, he is competent to assert that right

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in a separate suit, but not as defendant in this suit. The plaintiffs-purchasers are entitled to possession, and we must therefore affirm the decision of the Courts below, and dismiss this appeal with costs.

TYRRELL, J.—I concur in the decision of the learned Chief Justice that this appeal must be dismissed with costs.

Appeal dismissed.

1885 *July* 13.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

BHOLA AND OTHERS (PLAINTIFFS) *v.* RAMDHIN AND OTHERS (DEFENDANTS).*

Question of proprietary right decided by Revenue Court under Act XIX of 1873 (*N.-W. P. Land Revenue Act*), *s.* 113—*Omission by Revenue Court to frame decree—Decision of Revenue Court not open to attack by suit in Civil Court—Act XIX of* 1873, *s.* 113.

A Revenue Court acting under the provisions of ss. 112 and 113 of the N.-W. P. Land Revenue Act (XIX of 1873) recorded a proceeding declaring the nature and extent of the respective rights of the parties before the Court, and prescribing the mode in which partition should be effected. No decree was framed in accordance with this proceeding.

Held, that the proceeding of the Revenue Court was a decision by a Court of competent jurisdiction, and could not be interfered with by a suit in the Civil Court disputing its correctness.

THIS was a suit for possession of a one-fourth share of certain khatas of land in a village called Basehra, and for a declaration that the defendants were not entitled to possession thereof. It appeared that in 1883 the defendants applied to the Revenue Court for partition of the shares in the land in question, and that the plaintiffs objected that the applicants, having been out of possession for more than twelve years, were not competent to obtain partition, and that they themselves, by long-continued possession and cultivation, had acquired exclusive proprietary rights in the land. The Revenue Court decided this point adversely to the plaintiffs, and recorded a proceeding declaring the nature and extent of the respective rights of the parties, and prescribing the mode in which partition should be effected. No decree was framed in accordance with this proceeding.

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* Second Appeal No. 1354 of 1884, from a decree of A. Macmillan, Esq., District Judge of Meerut, dated the 10th June, 1884, affirming a decree of Maulvi Munir-ud din Ahmad, Munsif of Gáziabad, dated the 31st March, 1884.

The plaintiffs subsequently brought the present suit against the same defendants in the Court of the Munsif of Gháziabad. The Munsif was of opinion that the suit would not lie, inasmuch as the Revenue Court had acted under the provisions of ss. 112 and 113 of the N.-W. P. Land Revenue Act (XIX of 1873), and its decision was, under s. 114, equivalent to a decision of a Civil Court, and, as such, open to appeal to the District or High Court; but that the plaintiffs could not, without instituting such appeal, attack that decision by suit. The Court accordingly dismissed the claim. On appeal, the District Judge of Meerut affirmed the decree. The lower appellate Court observed:—"It appears from the ruling in *Ranjit Singh* v. *Ilahi Bakhsh* (1) that the Civil Courts could have been moved to direct the Revenue Court to frame a decree in accordance with the proceedings declaring the nature and extent of the interests of the parties, and that an appeal could have been laid from that decree. The decision of the Revenue Court, as set forth in its proceeding, though not followed by a decree, was a decision by a competent Court, and is a bar to the institution of this suit."

The plaintiffs appealed to the High Court, on the grounds that "the lower Courts were wrong in holding that the finding of the Revenue Court in the partition suit barred the present suit, because the said finding was not an order or decision in conformity with the provisions of s. 113 of the Revenue Act;" and that "inasmuch as the question of right raised in the partition case was not inquired into in the manner provided by s. 113, there could be no such determination of title as would bar the present suit."

Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *J. E. Howard*, for the respondents.

PETHERAM, C. J., and BRODHURST, J.—We think that this appeal must be dismissed. The simple question before us is, whether the Civil Court can interfere with the decision of a question decided by a Court of competent jurisdiction by a suit filed for that purpose. It is urged that the Revenue Court, whose decision is impugned, did not act in conformity with the provisions of the

(1) I. L. R., 5 All, 520.

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law. That would be a good reason probably for an application to correct that decision ; but, so long as it stands, it is a decision of a Court of competent jurisdiction, and cannot be interfered with by the present proceedings. If the parties wish to dispute the correctness of the decision, they should take other steps. The decree of the lower appellate Court is affirmed, and this appeal is dismissed with costs.

Appeal dismissed.

1885 *July* 18.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

DEBI DAS (DEFENDANT) *v.* LACHMAN SINGH (PLAINTIFF).*

Small Cause Court suit—Suit to recover a share of money recovered by co-plaintiff under a decree—Act XI of 1865 (*Mufassal Small Cause Courts Act*) *s.* 6.

Held that a suit to recover a share of money which had been recovered by a co-plaintiff under a decree was a claim for money due on a contract, within the meaning of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865), and was therefore a suit of the nature cognizable by a Court of Small Causes, in which, under s. 586 of the Civil Procedure Code, no second appeal could lie.

THE facts of this case are sufficiently stated for the purposes of this report, in the judgment of Petheram, C. J.

Pandit *Ajudhia Nath*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

PETHERAM, C. J.—When this case was called on, it was urged as a preliminary objection that, the suit being one cognizable by a Court of Small Causes, and being in respect of a claim of less than Rs. 500 in value, there was no second appeal to this Court. This objection has been argued at some length before us, and I am of opinion that it must prevail, and that the appeal to this Court will not lie. The action was brought to recover a share of money recovered under two decrees passed in suits in which the plaintiff and defendants, or the persons through whom they claim, were plaintiffs-decree-holders. The plaintiff and defendants in this suit, or those through whom they claim, were joined in these two suits as plaintiffs, and this suit is brought to recover the share which belonged to one of those plaintiffs as between him and his co-plaintiff. In my opinion, the suit is founded on a contract, and is with-

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* Second Appeal No. 1276 of 1884, from a decree of Maulvi Muhammad Sami-ulla Khan, Subordinate Judge of Aligarh, dated the 23rd July, 1884, affirming a decree of Pandit Rajnath, Munsif of Aligarh, dated the 30th August, 1883.

in the terms of s. 6 of the Mufassal Small Cause Courts Act, which runs as follows:—"The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, &c."

In my opinion, this is a claim for a debt due on a contract. When parties are jointly interested in money, and one of them becomes possessor of a larger share than properly belongs to him, there is an obligation or contract implied that he will pay to the other the portion he has become possessor of in excess of that to which he was entitled. The best way of describing a contract is to say that it is a state of things in which two or more minds mutually agree upon the same thing, and in respect of some object in which all are interested. It may be the express agreement of the parties, stating in terms their intentions and wishes, or it may be an agreement implied from their acts. Where there is no express agreement, the state of mind or the agreement may be gathered or implied from the acts of the parties. In the case before us, it is clear that the parties, or the persons through whom they claim, joined together for the purpose of recovering money in which they were jointly interested. Now, it is clear that it was implied that they should divide the moneys so realized. It was implied also, in the absence of an express agreement, that if one party recovered or realized more than his share, that party was under an obligation to the other in respect of the excess so recovered to pay the same to him. That being so, the suit was one based on a contract within the meaning of s. 6 of the Mufassal Small Cause Courts Act, and was cognizable by the Court of Small Causes. By s. 586 of the Code, second appeals in such cases are prohibited. The preliminary objection must prevail, and this appeal must be dismissed with costs.

STRAIGHT, J.—I am of the same opinion. It appears to me that this suit is of a description very common in England. It is a receipt of money by a person with a legal obligation on him to pay the same to another person. There are two questions to be considered. First, does the money belong to the plaintiff? And secondly, was it received for the plaintiff? If these questions are answered in the affirmative, the case involved all the conditions of

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a contract. It was a debt between the parties which could be recovered. The learned Chief Justice has defined a contract, and has shown that the facts alleged by the plaintiff constitute a contract within the meaning of s. 6 of Act XI of 1865 I never had any doubt that the preliminary objection to the hearing of this appeal was a sound one, and that the suit was of the nature of those cognizable by Small Cause Courts.

I may add that there are no less than nine cases reported in the *Weekly Notes* and the Indian Law Reports of decisions of this Court on this point, that a contract exists under circumstances such as that asserted by the plaintiff in this suit. Under these circumstances, an appeal does not lie to this Court, and this appeal must be dismissed with costs.

Appeal dismissed.

1885 *July* 18.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SHIB LAL (DECREE-HOLDER) *v.* RADHA KISHEN (JUDGMENT-DEBTOR)*

Act XV of 1877 (*Limitation Act*), *sch ii, No.* 179—" *Step in aid of execution of decree* "

R, in a suit against *S* and other persons, obtained a decree on the 24th December 1878, *S* being exempted from the decree, and being awarded costs against the plaintiff In executing his decree, *R*, on the 16th June, 1880, sought to set off the costs awarded to *S* against the amount due to himself. On the 6th August, 1880, *S* preferred objections to this course. On the 19th July, 1883, *S* applied for execution of his decree for costs.

Held that the application was barred by limitation, inasmuch as art. 179 (4) of the Limitation Act requires that the decree-holder should make a direct and independent application for execution on his own account, and it was not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

STRAIGHT and TYRRELL, JJ.—This appeal is presented under the following circumstances:—The plaintiff-respondent sued the defendant-appellant and certain other persons. He got a decree

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* Second Appeal No. 51 of 1885 from an order of W. T Martin, Esq., Officiating Additional Judge of Aligarh, dated the 27th March, 1885, affirming an order of Maulvi Muhammad Sami-ulla Khan, Subordinate Judge of Aligarh, dated the 9th May, 1884.

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SHIB LAL v. RADHA KISHEN.

against those other persons, but the defendant was exempted from the decree, and costs were awarded to him against the plaintiff-respondent, and the former was thus a decree-holder for the amount of costs against the plaintiff-respondent. This decree was dated the 24th December, 1878. On the 16th June, 1880, the plaintiff sought to execute his decree against those other persons, and he sought to set off the costs awarded to the respondent against the amount due to him. On the 6th August, 1880, the appellant preferred objections to his costs being set off in this manner, and, on the 2nd September, 1880, his objections were disposed of. The appellant then, on the 19th July, 1883, applied for execution of his decree for costs. The application has been rejected on the ground that it was not made within three years from the date of the decree. The appellant contends that his application was within time; that is, within three years from the date of the objection to the application of June, 1880. In other words, he contends that by filing his objections he took a step in aid of the execution of his own decree.

This contention is not sustainable. We think that art. 179 of the Limitation Act requires that the decree-holder should make a direct and independent application for execution of his own decree on his own account; and it is not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case. Were we to allow this contention, we should have to hold that resistance to another person's decree is a step in execution of a man's own decree. In this view of the matter, we dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

1885 *July* 18.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BRADLEY (DEFENDANT) *v.* ATKINSON (PLAINTIFF)*

Landlord and tenant—Notice to quit—Act IV of 1882 (*Transfer of Property Act*), *s.* 106.

On the 11th December, 1882, *A*, who had, on the 1st July, 1882, let rooms in a dwelling house to *B*, sent a letter to the tenant in the following terms.—

* Appeal No. 2 of 1885, under s. 10 of Letters Patent.

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"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February, 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter.

Held by the Full Bench, with reference to the terms of s. 106 of the Transfer of Property Act, that the letter was not such a notice to quit as the law required, inasmuch as it was not a notice of the lessor's intention to terminate the contract at the end of a month of the tenancy.

Per STRAIGHT, J., *quære*, whether the letter was a notice to quit at all.

Also *per* STRAIGHT, J.—A notice to quit must be certain, at all events in respect of the date of the determination of the tenancy: in other words, there must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation of the premises, become a trespasser. *Ahearn* v. *Bellman* (1) distinguished.

The judgment of MAHMOOD, J., (2) reversed, and that of OLDFIELD, J., (3) affirmed.

THIS was an appeal to the Full Court, under s. 10 of the Letters Patent, from a judgment of Mahmood, J., in a second appeal, in which that learned Judge differed in opinion from Oldfield, J., who held that the appeal should be allowed. The facts of the case and the judgments of Oldfield and Mahmood, JJ., will be found reported at p. 596, *ante*. It will be sufficient here to state that, on the 11th December, 1882, Mr. R. A. Fairlie, the agent of the plaintiff, Mrs. Elizabeth Mary Atkinson, who had, on the 1st July of the same year, let rooms in a dwelling-house to the defendant Mr. John Bradley, sent a letter to the tenant in the following terms:—"If the rooms you cocupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February, 1883, the rooms not having been vacated, the plaintiff instituted a suit against the defendant for ejectment, with reference to the above letter. At the hearing of the appeal, Mahmood, J., concurring with the Courts below, was of opinion that the letter was a valid notice to quit under ss. 106 and 111 of the Transfer of Property Act (IV of 1882), and that the suit for ejectment was maintainable. Oldfield, J., was of the contrary opinion. The defendant appealed to the Full Court.

(1) L. R., 4 Exch. Div. 201. (2) *Ante*, p. 599.
(3) *Ante* p. 597.

Mr. *C. H. Hill*, for the appellant.

Mr. *G. E. A. Ross*, for the respondent.

PETHERAM, C. J.—I am of opinion that in this case the judgment of Mr. Justice Oldfield was right, and that the notice to quit, which was given by Mr. Fairlie on the 11th December, 1882, was not such a notice as could terminate the contract of tenancy. The law on the subject is contained in s. 106 of the Transfer of Property Act, and the portion of that section which applies to the present case provides that "a lease of immoveable property for any other purpose" than agricultural and manufacturing purposes "shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice, expiring with the end of a month of the tenancy." This provision is incorporated in every contract of tenancy of this kind; and, this being so, the contract between the lessor and the lessee was a contract of monthly tenancy: that is, a tenancy at a rent which was payable monthly. Further, one incident of such a contract was that either party might terminate the arrangement at the end of any current month by giving fifteen days' notice of his intention to do so. This would be the only right which the parties had to terminate the contract. The meaning of such an arrangement is that the rent was to be paid monthly, and that there should be no broken rent, so that the tenancy was one from month to month, and terminable at the end of the month at the will of either party.

Now, in order to terminate the tenancy, either party must give the other notice of his intention; but it must be a notice of his intention to do what he is legally competent to do. The question here really is, whether the notice in question was a notice of Mr. Fairlie's intention to terminate the contract at the end of a month of the tenancy. I am of opinion that it cannot be so considered. The words of the notice are:—"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of the rents due at the enhanced rate." It is obvious that the words "the enhanced rate" referred to something before. Then, was this an intimation of an intention to terminate the tenancy on the 31st December, 1882? I am clearly of opinion that it was not.

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It is an intimation on the part of the lessor that, if the rent should not be paid within a month's time from that date, he would bring a suit against the lessee. He merely tells the lessee to vacate the rooms or to pay the penalty. This is not a notice which can terminate the tenancy, and therefore the tenancy was not determined. Under these circumstances, judgment should be for the defendant. The appeal must be decreed with costs of all Courts. The decree of the lower appellate Court will be varied to this extent, that the portion decreeing ejectment will be set aside with costs, and the residue of the claim will stand as decreed with costs.

STRAIGHT, J.—I have considerable doubts as to whether the document in question is a notice to quit at all. I am inclined to think that it was only a demand for possession of the premises: in other words, it was an intimation by the plaintiff that, within a period not exceeding a month from that date, the defendant should deliver up possession of the rooms which he then occupied. But as the document has, throughout the case, been treated as a notice to quit, it will be convenient if I deal with it on that assumption, and state the view which I hold upon the question whether it sufficiently complies with the provisions of the law. A notice to quit has been described as "a certain reasonable notice required by law, or by custom, or by special agreement, to enable either the landlord or the tenant, or the assignees or representatives of either of them, without the consent of the other, to determine a tenancy from year to year, from two years to two years, or other like indefinite period." Documents of this kind must be certain, at all events in respect of the date of the determination of the tenancy; in other words, there must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation of the premises, become a trespasser. In the notice now in question, no date is specified, but the lessee is informed that "if the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of the rent due at the enhanced rate." It has been argued by Mr. Ross that the defendant, being presumed to know the law, must consequently be presumed to know that, under the notice, he would have to leave the premises by the 1st January, 1883, and that if he remained in

possession after that date he would become a trespasser; that is to say, he was to read a notice which gave him till the 11th January as meaning the 1st January. It appears to me that if the plaintiff, between the 11th December, 1882, and the 12th January, 1883, had attempted to take steps for the ejectment of the defendant, the latter would have had a good answer by setting up that he was in possession with the leave and license of the plaintiff. Under these circumstances, I am of opinion that the document is not one which gave the lessee notice to quit on the 1st January, 1883.

The learned Chief Justice has referred to the provisions of the law upon this point. It appears to me that the words in s. 106 of the Transfer of Property Act—"fifteen days' notice expiring with the end of a month of the tenancy"—mean what they purport to mean. In the present case, the tenancy began on the 1st July, 1882, and a good notice to quit would have to be so dated as to require the tenant to quit upon the first of a month.

Mr. Justice Mahmood has referred in his judgment to several cases. Of these I need only mention *Ahearn* v. *Bellman* (1). There the lessor gave the lessee notice in writing to quit upon a specified day, and then went on to say—"and I hereby further give you a notice that, should you retain possession of the premises after the day before-mentioned, the annual rent of the premises now held by you from me will be £ 160, payable quarterly in advance." In that case, there was a difference of opinion. Bramwell and Cotton, L. JJ., were of opinion that the clear and explicit first portion of this notice was not impaired or rendered nugatory by the alternative given by the second portion, of continuing to hold the premises at an increased rent. As I understand those learned Judges, all they said was that the document constituted a determination of one tenancy, and was not invalidated because it proposed another. No doubt Brett, L. J., differed, and his judgment mainly proceeded on a well-known dictum of Lord Mansfield; but neither from his remarks nor from those of his colleagues do I find any authority for the view that a document of the character before us would constitute a legal notice to quit, or that any notice not stating with certainty the correct date the tenancy should determine would be legally good.

(1) L. R., 4 Exch. Div. 201.

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I am therefore of opinion that my brother Oldfield was right; and I concur in allowing the appeal with all costs, and in varying the decree of the lower Court as proposed by the learned Chief Justice.

BRODHURST, J.—I am of the same opinion.

TYRRELL, J.—Under s. 106 of the Transfer of Property Act, the notice to quit the tenancy of a house may be in excess of fifteen days, at the pleasure of the lessor; but it is imperative that a valid notice must be such a notice that its last day will be the same as the last day of a month of the tenancy.

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APPELLATE CRIMINAL.

Before Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* TULLA AND OTHERS.

Practice—Trial in Sessions Court—Non-production of material witnesses for Crown —Duty of Public Prosecutor.

It is the duty of the Public Prosecutor at a trial before the Court of Session to call and examine all material witnesses sent up to the Court on behalf of the prosecution, and the Judge is bound to hear all the evidence upon the charge.

The Public Prosecutor is not bound to call any witnesses who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses.

IN this case, six persons named Tulla, Chidda, Chiddu, Jairam, Kallu and Lalji, were tried before the Sessions Judge of Moradabad, under s. 411 of the Penal Code, for dishonestly receiving stolen property, knowing or having reason to believe the same to be stolen property. All the accused were convicted and were sentenced, the first four to six months' rigorous imprisonment, and the last two to three and two years' rigorous imprisonment respectively with reference to the provisions of s. 75 of the Penal Code. Five of the witnesses for the Crown, who had been present on the various occasions when the premises of the accused were examined, and who had been sent up to the Sessions Court, were not called, and no reason for the exclusion of

their evidence appeared on the record. The accused appealed to the High Court. They were not represented by counsel.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

TYRRELL, J.—(after examining the evidence on the record in detail, continued):—It is obvious that the trial of this case has been in all respects inadequate, and, so far as regards the evidence for the prosecution, only half completed. In view of the order that I must make in the case, I refrain from comment on the evidence on the record further than to remark that, as it stands, it would not be sufficient to prove that the accused had the stolen articles in their possession, so as to make them guilty under s. 411 of the Penal Code. It has not been established that the stolen goods were in such places that the accused must necessarily have been privy to their deposit there, or that the places are not equally accessible to other persons; but in the imperfect state of the record, it is impossible to say whether these defects in the proof of the case for the prosecution might or might not have been removed by the evidence which has been excluded. It is true that the rule of the Criminal Procedure Code simply requires in general terms that the witnesses for the prosecution shall be called and examined before the accused is put on his defence, and contains no special prohibition of the exclusion of one or more of them from examination; but it does not require a rule stating in express terms that *all* the witnesses must be examined to indicate the necessity or propriety of examining all material witnesses sent up to the Sessions Court on behalf of the prosecution. It is the duty of the Public Prosecutor to call and examine all such witnesses, and the Judge is bound to hear all the evidence upon the charge. It is true that the Public Prosecutor is not bound to examine persons who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for the cross-examination of the accused at their descretion. In the absence of any such explanation or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecu-

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tion must be drawn from the non-production of its witnesses. If, however, the witnesses in the present case are excluded only because the Public Prosecutor or the Court thought their evidence superfluous, it would still have been proper to tender them for cross-examination by the accused. In the state of the record indicated by the foregoing observations, it is obviously impossible to deal justly with the appeal; for, while there may not be sufficient evidence on the record to support the conviction, it is very possible that the Court has illegally excluded evidence which would have sufficed to prove the guilt of the accused, in which case the determination of the case as it stands might result in a deplorable miscarriage of justice.

Under these circumstances, it is necessary—and I make this order with great reluctance—to cancel all the proceedings in the Sessions Court, and to direct a new trial of the accused according to law with the least possible delay.

New trial ordered.

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EXTRAORDINARY ORIGINAL CRIMINAL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

LAIDMAN *v.* HEARSEY.

Defamation—Justification—Express malice—Evidence of complainant having previously acted as alleged in the libel—Act XLV of 1860 (*Penal Code*), *s.* 499.

In a prosecution for defamation under s. 500 of the Penal Code, the alleged libel accused the complainant, who was a judicial officer, of (i) having, upon a particular occasion, used abusive language to certain respectable native litigants appearing before him in Court, and (ii) having, upon other occasions not specified, treated other respectable natives (not named), "in a similar manner." This latter accusation was contained in a postscript. The complaint filed by the complainant in the Court of the committing Magistrate, and the charge-sheet in which the Magistrate committed the defendant for trial, covered the whole of the document complained of, except the postscript. At the trial of the case, the defendant pleaded not guilty, and also relied on the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence to prove that, in making the charges contained in the alleged libel, the defendant was actuated by express malice toward the complainant.

Held, with reference to the terms of s. 499 of the Penal Code, that evidence of particular instances of abusive language applied by the complainant upon former occasions to natives appearing in his Court was admissible, first as relating to the question what was the reputation which the defendant was said to

have injured, and secondly because it must be gathered from the document complained of *as a whole* whether it showed a malicious intention or not.

THIS was a prosecution for defamation under s. 500 of the Penal Code, which was brought by Mr. George J. Laidman, Subordinate Judge and Judge of the Small Cause Court at Dehra Dún, against Captain A. W. Hearsey. The alleged libel was contained in a letter which was admittedly written by the defendant on the 25th February, 1885, to the Government of India, and to the Government of the N.-W. Provinces, and published by him. The letter was in the following terms:—

"I was in the Court of the Sub-Judge of Dehra Dún and Mussoorie, on the 9th February, to give evidence in a law suit.

"Whilst waiting there, three respectable Rajpoot zamindars (nephews of the late Saroop Dass, Mohunt of Dehra) entered the Court, where a case in which they were interested, and which had been returned to the Sub-Judge's Court by the High Court for rehearing and revision was to be heard on that day.

"When Mr. Laidman, C. S., the Sub-Judge, looked up and saw them, he burst out into abuse in the following words:—'*Soors* (pigs), *badmashes* (bad characters), *haramzadas* (bastards), '*Tum hamare degree High Court ko appeal kiya;*' and then again repeated the three obnoxious and abusive epithets, ordering them out of the Court till their case was called on.

"As I left the Court, these three men (whom I have known for upwards of twenty years to be quiet, respectable, high caste Rajpoot zamindars), came and asked me if I had heard the Sub-Judge *gali karo* (abuse) them, and if I had noticed what he said. I replied that I had. They then inquired, "Where shall we get justice? This is the Magistrate (*Hakim*) who will have to re-hear our case. We are poor men: will you on our behalf report this *zulum* (injustice, oppression) that we have suffered from the Sub-Judge?" I said I would, as I thought it must disgraceful and contrary to law that a Covenanted Bengal Civilian, holding the position of a Sub-Judge, should be guilty of such a gross abuse of authority whilst sitting on the Bench to administer JUSTICE! That the conduct of Mr. Laidman was a criminal offence, he having been guilty of criminal defamation of character by the use of offensive, abusive, and

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injurious expressions to respectable native litigants, who, in the ordinary course of business, had to appear before him for the purpose of urging a just claim in the prosecution of a civil suit: and also criminally, as such language, if used to any Englishman, would most undoubtedly have led to a breach of the peace.

"In my humble idea, I consider it a public duty to bring such a gross and wanton dereliction of duty to your notice, as a continuance of such unjust and oppressive conduct and language is liable, in the eyes and opinion of the natives of this country, to bring general discredit and contumely on the whole Civil Service of India, unless some wholesome example is made. I consider the conduct on the part of the Sub-Judge in question not only illegal and cruelly oppressive, but also ungentlemanly and cowardly in the extreme, as he would not have dared, under the circumstances we have related, to have addressed such language to any of his own countrymen. I have only further to add that the Sub-Judge Mr. Laidman, when officiating for the Superintendent of the Dun in the end of 1883, fined a gentleman in Mussoorie the sum of Rs. 300 for saying in a privileged conversation that the Municipality were a set of pigs: so he should have been the last person in India to have used the offensive epithet *soor* to any individual, still less to respectable Hindu zemindars who appeared before him for justice !!!

"In conclusion, I feel confident that after the perusal of this, you will grant these men full investigation and ample redress from the insults they have received from a member of the Covenanted Civil Service of India. Mr. Laidman, still more to annoy and distress these men, has already postponed the rehearing of their case on three occasions, thus causing them unnecessary expense and delay. I have the honor to be, your most obedient Servant, A. W. HEARSEY, *Captain, Retired List, Her Majesty's service.*"

"This is not an isolated case of Mr. Laidman's abusing respectable natives in his Court. When the time comes, I can produce several others whom he has treated in a similar manner."

Upon obtaining a copy of this letter, Mr. Laidman, to whom sanction was given by Government for the prosecution of Captain

Hearsey, demanded an apology, and, this having been refused, instituted proceedings, which resulted in the committal of the defendant for trial by the High Court. The complaint filed by Mr. Laidman in the Court of the Assistant Magistrate of Dehra Dún, and the charge-sheet in which the Magistrate committed the defendant for trial, substantially covered the whole of the letter of the 25th February, with the exception of the postcript, which referred to alleged previous instances of abusive expressions applied by the complainant to respectable natives in his Court.

At the trial of the case before Petheram, C. J., and a jury, the defendant admitted having written and published the matter complained of, but pleaded not guilty, and also relied upon the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence suggesting the inference that, in making the charges contained in the alleged libel, the defendant was actuated by express malice. This evidence consisted of, (1) decisions passed by the complainant in cases in which the defendant was more or less directly interested, (2) a judgment in which the complainant commented in severe terms upon the defendant's conduct and demeanour in Court, and (3) a letter written by the defendant to the Registrar of the High Court, in which he imputed dishonesty to the complainant in the conduct of a particular case.

The complainant was the first witness called by the prosecution. In cross-examination, Mr. *J. D. Gordon*, for the defence, asked the following question :—

"Will you swear that you have never in Court used any offensive expression to any native of this country?"

Mr. *G. E. A. Ross*, (with him Babu *Dwarka Nath Banarji*), for the prosecution, objected to this question. He submitted that particular instances of abusive expressions used by the complainant on former occasions were not relevant under s. 138 of the Evidence Act; and that, assuming questions relating to such instances to be admissible as being directed to shaking the credit of the witness, under s. 146, it would not, under s. 153, be open to the defence to give evidence contradicting his statements.

[PETHERAM, C. J.—We are not trying the defendant for telling a falsehood, but for defaming the complainant in his character as a

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Judge. Upon this issue I am of opinion that the whole of the complainant's character as a Judge is relevant.]

The first witness called by the defence was Mr. E. G. Mann, who deposed to having practised for some time as a pleader in the complainant's Court at Mussoorie.

Mr. *Gordon.*—Have you ever heard the complainant use abusive language in Court to natives who had to appear before him?

Mr. *Ross.*—I object to the question. The charge as laid and to which the inquiry should be confined, is a charge of particular acts of misconduct alleged to have been committed at a specified time and place towards a specified individual. Upon this issue, instances of other acts committed at other times and towards other persons are not admissible in evidence either as facts in issue or as relevant facts. They do not fall within the definition of "facts in issue" given in s. 3 of the Evidence Act, because the general conduct of Mr. Laidman in Court is not in issue, and the truth of the specific charge as to the complainant's conduct in Court on the 9th February does not "necessarily follow" from anything he may have done upon other occasions. Nor do they come within any of the provisions of ss. 6—14 of the Evidence Act, showing what facts are relevant; and hence there is no section in the Act which warrants the introduction of the evidence. Under s. 5, therefore, it is inadmissible.

[PETHERAM, C. J.—The question is, whether the defendant's letter of the 25th February defamed the complainant or not. The prosecution have gone into the past relations of the parties to show that the defendant acted with a malicious intention. Mr. Gordon now seeks to show that Mr. Laidman, as a Judge, has no character to be defamed. This is a fact in issue. A statement which is defamatory of one person is not necessarily defamatory of another. The defendant is not being tried for telling a falsehood, but for filching a man's character. Upon this question it is necessary to consider what the complainant's character is.]

Mr. *Ross.*—Assuming that a man's character is bad, that cannot justify another in making false statements concerning him.

[PETHERAM, C. J.—If this were a civil action, the case might be different. But here you put the law in motion against a man

whom you accuse of committing a crime, and with a view to his punishment.]

Mr. *Ross.*—The case of a civil action is closely analogous. In such an action, evidence of particular facts tending to show the plaintiff's misconduct might possibly be admissible in reduction of damages, but not to support a plea of justification. For the latter purpose, there is not a single precedent or provision of the law which warrants the admission of such facts in evidence. The case of *Scott* v. *Sampson* (1), and in particular the judgment of Cave, J., who fully reviewed the authorities on the subject, supports this contention. The grounds of the rule there laid down are, that statements of this description are so vague and general that to admit evidence upon them would be, in effect, "to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life," and "would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of." These grounds are equally applicable to criminal proceedings, which, therefore, should be governed by the same rule; and hence it follows that evidence of this description, even assuming it to be admissible in mitigation of punishment, is not admissible for the purpose of justification.

[PETHERAM, C. J.—In that case there was no attempt on the part of the prosecution to prove express malice. In this case you charge express malice, and then seek to confine the inquiry to a particular part of the document, though the question is whether the defendant acted maliciously, and whether the document *as a whole* is true. If in *Scott* v. *Sampson* (1) the general character of the plaintiff had been attacked, I should think that the defence would have been entitled to give evidence adverse to his general character. The libel there charged a theatrical critic with abusing his position by attempting to extort money, and it was held that this charge could not be justified by showing that he had abused his position in other ways. All that the Court really decided was that if, for example, a libel charged a man with having been drunk on a particular

(1) L. R., 8 Q. B. D. 491.

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occasion, it could not be justified by evidence showing that on other occasions he had committed theft. There is nothing in the reports to exclude evidence of particular instances of the same kind of misconduct as that alleged in the libel. In the present case this document is only a part of the matters put before the jury to support the charge of malice, and which do prove malice if they are not contradicted. You virtually claim that the prosecution may go into these general matters, but that the defence may only contradict you as to a part. The case of *Lawson* v. *Labouchere* (1) appears to me to be more in point than *Scott* v. *Sampson* (2) In that case the complainant was cross-examined at great length upon his conduct as a journalist, and in order to contradict him files of the *Daily Telegraph* for some years back were put in. Apart from this, however, I am of opinion that, in the present case, Mr. Laidman's character is a fact in issue.]

Mr. *Ross*.—It is in issue, not generally, but with reference only to particular expressions said to have been used on a particular occasion. This is shown by the complaint filed by the prosecution, and by the charge framed by the committing Magistrate. The prosecution has not been instituted in respect of every allegation contained in the defendant's letter of the 25th February, but only in respect of such of the allegations as are sufficiently specific to admit of an answer. It was necessary to put in the whole document, but the defendant has not been required to plead to any points other than the statements relating to the 9th February and to the adjournments. The other imputations were not made the subject of charge, because they are so indefinite and general, specifying neither time, place, nor person, that it was impossible to bring evidence regarding them or to meet them in any way. Any evidence therefore upon these allegations must necessarily take the complainant by surprise, and subject him to great hardship.

[PETHERAM, C. J.—If the complainant had chosen to take civil proceedings, the difficulty would have been avoided. Not having done so, he must take the consequences.]

Mr. *Ross*.—The rules of the service practically made such a course impossible. The official reputation of a civil servant is considered as being in the hands of his superiors, and the complainant

(1) Not reported. (2) L. R., 8 Q. B. D. 491.

was bound, as a matter of fact, to take only such action as they approved. [The learned Counsel referred to the *Manual of Government Orders, North-Western Provinces,* Vol. I, p. 156 (Judicial Criminal) :—"All officers must obtain the authorization of Government before having recourse to the Courts for vindication of their public acts or their character as public functionaries from defamatory attacks. This order does not affect an officer's right to defend his private dealings or behaviour in any way that may seem to him fit ; but his official reputation is in the charge of the Government which he serves."]

[PETHERAM, C. J.—That rule does not appear to me to apply to charges of this kind, but to charges relating to a man's competency in his work, and to the fairness of his decisions. In using offensive expressions from the Bench, a man does not, in my opinion, act in his "official" character, but out of his own folly. I regard the matter as a vulgar little quarrel, and as having nothing of the character of a state trial about it.]

Mr. *Ross.*—It is not merely a prosecution brought by a private person, but a prosecution brought by a public official to vindicate his character. For this purpose he is entitled to use the remedy provided by law.

[PETHERAM, C. J.—I shall tell the jury that he cannot use a criminal prosecution for that purpose. The object of such proceedings is not to seek a remedy for an individual injury, but to punish a crime, and the complainant is only interested, like any other member of the public, in seeing that justice is done. With reference to the alleged hardship caused to the complainant, it will be for the jury to consider whether he has been so taken by surprise that they should regard the evidence with suspicion.]

Mr. *Ross* asked that the point might be reserved under the Charter for decision by the Full Court.

Mr. *Gordon,* for the defence, was not called on to reply.

PETHERAM, C. J.—The whole question which has been raised by this objection turns upon the construction to be placed upon the language of s. 499 of the Penal Code. That section creates the criminal offence of defamation, and whoever is guilty of the offence as therein defined, is liable to punishment in the public

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interests. The question of guilt is for the jury to consider, who must have before them all the evidence, and who must consider it without reference to the interests of any other person than the public and the prisoner. The words of s. 499 are as follows:—"Whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

The question here is whether, with reference to these words alone, and apart from the rest of the section, Captain Hearsey intended to harm the reputation of Mr. Laidman. Before this question can be answered, it is essential to see what Mr. Laidman's reputation is, and, moreover, Mr. *Ross* puts the case for the prosecution on the ground that Captain Hearsey acted with a malicious intention to injure the complainant by telling a falsehood, and not with a genuine intention to furnish proper information to the public. Upon this issue, it must be material to ascertain whether Captain Hearsey, in his letter *as a whole*, was telling the truth or not.

For these reasons I rule that this evidence is admissible, that is to say, first, because it relates to the question what is the reputation which the defendant is said to have harmed; and secondly, because it must be gathered from the document *as a whole* whether it shows a malicious intention or not. I decline to reserve the point for the Full Court, being of opinion that to do so would not serve the interests of either party.

CIVIL REVISIONAL.

1885 *July* 23.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.

BALDEO DAS (PETITIONER) *v.* GOBIND SHANKAR (OPPOSITE PARTY.)*.

Act XL of 1858 (*Bengal Minors Act*), *s.* 3—*Certificate of administration—Right of holder of certificate to defend suits connected with minor's estate—High Court's powers of revision—Civil Procedure Code, ss.* 2, 622.

Under s. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration

* Application No. 147 of 1885, for revision under s. 622 of the Civil Procedure Code, of an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 5th June, 1885.

under the Act, to defend a suit on the minor's behalf, as guardian of such minor.

Where a Subordinate Judge had so acted,—*held* that the High Court had no power to revise his order under s. 622 of the Civil Procedure Code.

The facts of this case are sufficiently stated for the purposes of this report, in the judgment of Petheram, C. J.

Mr. *G. E. A. Ross*, Babu *Dwarka Nath Banarji*, and Pandit *Ajudhia Nath*, for the petitioner.

Mr. *T. Conlan*, Munshi *Hanuman Prasad*, Lala *Juala Prasad* and Munshi *Madho Prasad*, for the opposite party.

PETHERAM, C. J.—I think that this application must be rejected. It is an application under s. 622 of the Civil Procedure Code, against an order of the Court of the Subordinate Judge, in which that Court refused to exercise a jurisdiction vested in it by law. The plaintiff brought an action against a particular person who did not appear in the suit. A third person came forward, who is the applicant before us, and claimed to be put on the record as defendant. The Subordinate Judge refused to admit him to defend the suit. I think he had no power to make that entry on the record. This third person urged that he had a right to come in under s. 3 of Act XL of 1858. Now, the application is based on the fact that the applicant has obtained a certificate, and no person, by s. 3 of Act XL of 1858, is entitled to institute or defend any suit for a minor unless he has obtained a certificate under the Act. The latter part of that section makes a certificate necessary, and by implication it gives him the right when he has obtained the certificate. Subsequent to the passing of Act XL of 1858, the Civil Procedure Code was passed; but, after looking at s. 464 of that Code, it would appear that we must look at this application as if these provisions, from s. 442 to s. 462, did not exist. Now, the words contained in s. 3 of Act XL of 1858, and the prohibition therein contained, cannot be made larger than they are. After a person has obtained a certificate, he may take the conduct of the minor's estate in his hands, and bring and defend suits. Supposing that this third party is right in his claim, he may ask to defend the suit, not in his own name, but as guardian of the minor.

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The Judge had no power to pass the order he did; but we cannot interfere in revision, and this application must be rejected with costs.

TYRRELL, J.—I agree with the learned Chief Justice's view of this application. I think also that it is very questionable whether any application to this Court would lie as made before us. The application to the lower Court, if made under s. 32 of the Act, is not appealable. There is no appeal under s. 588, but there is the question whether the order of the lower Court could not be considered a decree, within the meaning of the definition section (2) of the Civil Procedure Code. The petitioner claimed to appear as guardian. The Court decided he had not that right. That order decided his position in the suit. It seems to me that an appeal might have been preferred, and for this reason also this application must be rejected with costs.

Application rejected.

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APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt, Chief Justice, and Mr. Justice Tyrrell.

HIRA AND ANOTHER (PLAINTIFFS) *v.* KALLU AND OTHERS (DEFENDANTS).*

Pre emption—Hindus—Local custom—Sale to a stranger.

The right of pre emption, when it exists among Hindus, is a matter of contract or custom agreed to by the members of a village or community. Such a custom is not properly described as attached to the land, and as soon as any members of a Hindu community, who have agreed to be governed by it, sell to any one who is a stranger to the agreement, the land is no longer subject to pre-emption.

THIS was a suit to enforce a right of pre-emption, and was founded upon an alleged custom of a *mohalla* in the city of Muzaffarnagar, in which the pre-emptive property, which was part of a house, was situated. All the parties to the suit were Hindus. The defendant-vendee pleaded, *inter alia*, that her right to the property was preferential to that set up by the plaintiffs, inasmuch as she had lived for many years in the house in question, which had formerly belonged to her husband. The Court of first instance (Munsif of Muzaffarnagar) found that the existence of the alleged custom in the part of the town in which the property was situate was

* Second Appeal No. 1481 of 1884, from a decree of C. W P. Watts, Esq., District Judge of Saharanpur, dated the 10th June, 1884, affirming a decree of Maulvi Muhammad Said Khan, Munsif of Muzaffarnagar, dated the 7th December, 1883.

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HIRA
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not proved, and accordingly dismissed the claim. On appeal, the District Judge of Saharanpur affirmed the decree, being of opinion that the plaintiffs had not established a right preferential to that of the defendant-vendee.

In second appeal, it was contended on behalf of the plaintiffs that, "as it was admitted that in the town of Muzaffarnagar the custom existed, it must be presumed to exist in this *mohalla* also," and that "the appellants as neighbours have a preferential right to purchase."

Lala *Lalta Prasad*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

PETHERAM, C. J.—This appeal must be dismissed with costs. I agree with the learned Judge in his decision, but not altogether for the reasons assigned by him. The suit was based on a wrong idea as to the custom of pre-emption asserted by Hindus. Pre-emption is a right which is known to the Muhammadan Law. It is not fixed to the land or country, but follows the persons of Muhammadans wherever they may be in the world. Among Hindus, on the other hand, it is a matter of contract or custom agreed to by the members of a village or community. When it is said that such a custom is attached to the land, I do not think that is a correct description. A community of Hindus may agree to be governed by the custom of pre-emption, but the moment they sell to a stranger to the agreement, there is no pre-emption attaching to the land. I think there is no ground for declaring such a custom to exist. The Judge was right in his decision, and this appeal must be dismissed with costs.

TYRRELL, J., concurred.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.

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HANUMAN RAI (PLAINTIFF) *v.* UDIT NARAIN RAI AND OTHERS (DEFENDANTS.)*

Pre-emption—Wajib-ul-arz—Transfer under compromise and decree thereon to person claiming pre-emption.

An appeal having been preferred from a decree in a suit for pre-emption, based on the *wajib-ul-arz* of a village, the parties to the suit entered into a compromise

* Second Appeal No 1501 of 1884, from a decree of Lala Mata Din, Officiating Subordinate Judge of Gorakhpur, dated the 16th June, 1884, reversing a decree of Maulvi Ahmad Ali Khan, Munsif of Bansgaon, dated the 19th March, 1884.

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whereby the plaintiff-pre emptor relinquished his claim to a part of the property in dispute in favour of the defendants-vendees, and the latter admitted his claim with respect of the remainder of the property. Upon this compromise a decree was passed Subsequently a co-sharer in the village where the property was situate brought a suit for pre emption upon the contention that the compromise and the decree passed thereon amounted to a transfer to the plaintiff in the former suit, within the meaning of the *wajib-ul arz*

Held that the suit was not maintainable.

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village, which gave the right to co-sharers in cases of "transfers" or sales to strangers. The plaintiff Hanuman Rai, together with defendant No. 2, Ganga Din (who was a stranger) and other persons, had purchased shares in two villages, Siri and Kharang, under a joint sale-deed. Thereupon the respondent in this case, Udit Narain Rai, brought a suit for pre-emption in respect of the sale, excluding the share purchased by the plaintiff, and obtained a decree, and paid the consideration-money into Court within the period prescribed. An appeal was preferred from the decree, and the parties entered into a compromise, whereby the plaintiff-pre-emptor relinquished his claim to a two pies share in each village in favour of the defendants-vendees, and the defendants-vendees admitted the plaintiff-pre-emptor's claim with respect to the remainder of the property transferred. Upon this compromise a decree was passed.

The present suit was brought by the plaintiff upon the contention that the proceedings just described amounted to a transfer, within the meaning of the *wajib-ul-arz*, and therefore gave rise to the right of pre-emption; and alleging further that he was a nearer co-sharer in the two villages than Udit Narain Rai, and therefore entitled, under the *wajib-ul-arz*, to enforce the right against him. The defendants (the parties to the compromise and the decree) contended that the transaction referred to was not a transfer, within the meaning of the *wajib-ul-arz*, in respect of which a right of pre-emption could be enforced. The Court of first instance (Munsif of Bansgaon) decreed the claim, holding that the transfer effected by the compromise and decree in favour of Udit Narain Rai "had all the incidents and properties of a sale," and therefore gave rise to the right of pre-emption. On appeal, the Subordinate Judge of Gorakhpur, being of the contrary opinion, reversed the decree.

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In second appeal, it was again contended on the plaintiff's behalf that the transfer to Udit Narain Rai, under the compromise, was a transfer of the nature contemplated by the *wajib-ul-arz*.

Munshi *Sukh Ram*, for the appellant.

Lala *Juala Prasad*, for the respondents.

PETHERAM, C. J.—I am of opinion that this appeal must be dismissed with costs. The sale, in respect of which the right of pre-emption is claimed, is a sale in which the right was claimed by another party, and was the subject of a compromise. The appellant urges that this compromise of a former suit had all the virtue of a private sale, and that, he being a nearer co-sharer, his right of pre-emption accrued in consequence. This action is, in effect, to have it established that another suit by the present defendant Udit Narain Rai was wrongly decreed. If we were to allow this, it would be reducing the right of action and proceedings for pre-emption to an absurdity. No sooner one suit was decreed for pre-emption, than another would be filed, and so it might go on from the nearest co-sharer's suit to the next and the next, down to the person whose interest in the village was the smallest and most remote. The lower appellate Court was right in dismissing the suit, and this appeal must be and is dismissed with costs.

TYRRELL, J.—I am of the same opinion.

Appeal dismissed.

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ACCOMPLICE. *See* Criminal Procedure Code, s. 338.
ACCUSED not defended. *See* Practice. 1.
ACKNOWLEDGMENT. *See* Execution of decree, 6.
ACQUIESCENCE. *See* Pre-emption, 6, 9.
ACTS—1858—XL, s. 3. *Certificate of administration—Right of holder of certificate to defend suits connected with minor's estate.*] Under s. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Act to defend a suit on the minor's behalf, as guardian of such minor.

Where a Subordinate Judge had so acted,—*held* that the High Court had no power to revise his order under s. 622 of the Civil Procedure Code

Baldeo Das *v.* Gobind Shankar 914

———, s. 26. *See* Majority.
———1859——VIII, s. 222. *Irregularity in warrant of attachment preceding execution-sale.*] An execution-sale of the right, title, and interest in land was set aside by the Court on the ground that the warrant for the execution of the decree and order of attachment of the property sold had not been signed by the Judge, but by the Munsarim of the Court; and at a second sale the property was sold to other purchasers, who, as well as the judgment-debtor, were sued by the purchaser at the first sale for a declaration of his right to have the first sale confirmed

The High Court having held that, with reference to s. 222 of Act VIII of 1859, the first sale had been rightly set aside, an appeal to the Judicial Committee was dismissed with costs.

Ram Dayal *v.* Mahtab Singh 506

———X s. 6. *See* Mortgage, 1.
———1860—XXVII. *See* Debt.
———XLV, ss. 24, 25. *See* s. 471.
———, s. 39. *See* s 296.
———, s. 40. *See* ss. 224, 225.
———, s. 71. *See* Magistrate, powers of.
———, s 79. *See* s. 296
———, ss. 146, 147, 149. *See* Offence made up of several offences.
———s 147. *See* Criminal Procedure Code, s. 35.
———s. 193 *Criminal Procedure Code, sch. V, No XXVIII (4)—Alternative charges—Contradictory statements—Assignment of false statements not necessary.*] In a charge under s 193 of the Penal Code it is not necessary to allege which of two contradictory statements upon oath is false, but it is sufficient, (unless some satisfactory explanation of the contradiction should be established), to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and a directly contradictory statement at another. *R* v. *Zumeerun*, *R.* v. *Palany Chetty*, and *R.* v. *Mahomed Hoomayoon Shah* followed: *Empress* v. *Niaz Ali* overruled.

Per DUTHOIT, J.—Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false.

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The English cases upon this subject are irrelevant to the interpretation of the law of India, since the Indian Legislature has not followed the law of England in regard to perjury. *Trimble* v. *Hill* and *Kathama Natchiar* v. *Dorasinga Tever* referred to.

Queen-Empress *v.* Ghulet 44

ACTS—1860—XLV, s. 201.] In a trial upon a charge under s. 201 of the Penal Code, the accused made a statement to the effect that he was present at the commission of a murder by two other persons, that he himself took no part in the act, that before the murder was committed one of the persons named pulled off a *razai* from the bed on which the deceased was sleeping, and that, in his presence, the *razai* was subsequently concealed in a stack. It was proved that the *razai* belonged to the deceased, that it was found concealed in a stack, and that it was was pointed out by the accused to the police. The accused was convicted of concealing evidence of the murder, with the intention of screening the offender from legal punishment, under s. 201 of the Penal Code.

Held that the conviction must be quashed, inasmuch as if the *razai* had not been concealed or destroyed, its presence or existence would have been no evidence of the murder.

A person who is concerned as a principal in the commission of a crime cannot be convicted of the secondary offence of concealing evidence of the crime.

Queen-Empress *v.* Lalli 749

———, ss. 224, 225. *Arrest of person required to give security for good behaviour—Escape from such arrest—Conviction for such escape illegal—Act XLV of* 1860, *s.* 40—*Criminal Procedure, ss.* 55, 110, 117, 118] An order was issued to a police officer directing him to arrest *K*, under s. 55 of the Criminal Procedure Code, as a person of bad livelihood. *K*, with the assistance of three others, resisted apprehension and escaped.

Held that *K* was not charged with an "offence" within the meaning of that term as defined in s. 40 of the Penal Code, and that consequently no offence made punishable by s. 224 or s. 225 of the Penal Code had been committed in connection with his evasion of arrest. *Empress* v. *Shasti Charn Napit* followed.

Queen-Empress *v.* Kandhaia... 67

———, s. 296. *Act XLV of* 1860, ss. 39, 79—*Disturbing a religious assembly—Muhammadan Law—Hanafia and Shafia Schools—Right to say 'amen' loudly during worship—Act VI of* 1871, *s.* 24—*Act I of* 1872, *s.* 57 (1)—*Muhammadan Ecclesiastical Law—Judicial notice.*] *A masjid* was used by the members of a sect of Muhammadans called the Hanifis, according to whose tenets the word "*amen*" should be spoken in a low tone of voice. While the Hanifis were at prayers, *R*, a Muhammadan of another sect, entered the *masjid*, and in the course of the prayers, according to the tenets of his sect, called out "*amen*" in a loud tone of voice. For this act he was convicted of voluntarily disturbing an assembly engaged in religious worship, an offence punishable under s. 296 of the Penal Code.

The Full Bench (MAHMOOD, J., dissenting) ordered the case to be re-tried, and that, in re-trying it, the Magistrate should have regard to the following questions, namely, (1) Was there an assembly lawfully engaged in the performance of religious worship? (2) Was such assembly, in fact, disturbed by the accused? (3) Was such disturbance caused by acts and conduct on the part of the accused by which he intended to cause such disturbance, or which acts and conduct, at the time of such acts and conduct, he knew or believed to be likely to cause such disturbance?

Held by MAHMOOD, J., that the discussion occasioned by the act of the accused having, presumably, taken place during the interval when the prayers were not going on, the assembly was not at that time "engaged in the performance of religious worship," and was not "disturbed" within the meaning of s. 296 of the Penal Code; that, in reference to the terms of s. 39 of the Code, the accused did

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not disturb the assembly "voluntarily"; that he was justified by the Muhammadan ecclesiastical law in entering the mosque and joining the congregation in saying the word "*amen*" loudly if he thought fit, and his conduct fell within the purview of s. 79 of the Penal Code, and was therefore not an offence under s. 296. *Beatty* v. *Gillbanks* referred to.

Also *per* MAHMOOD, J, that, having regard to the guarantee given by the Legislature in s 24 of Act VI of 1871 (Bengal Civil Courts Act), that the Muhammadan law shall be administered in all questions regarding "any religious usage or institution," the Court was bound by s 57 of Act I of 1872 (Evidence Act) to take judicial notice of the Muhammadan ecclesiastical law, and the rules of that lawneed not be proved by specific evidence.

Queen-Empress *v.* Ramzan 461

ACTS—1860—XLV s. 325. *See* Offence made up of several offences.

——————— s. 325. *See* Criminal Procedure Code, s. 35.

——————— s. 471. *Act XLV of* 1860, *ss.* 24, 25—*Fraudulently using as genuine a forged document*—"*Dishonestly*"—"*Fraudulently.*"] In a trial upon a charge, under s. 471 of the Penal Code, of fraudulently or dishonestly using as genuine documents known to be forged, it was found that four forged receipts for the payment of rent, used by the prisoner, had been fabricated in lieu of genuine receipts which had been lost.

Held that, with reference to the definitions of the terms "dishonestly" and "fraudulently" in ss. 24 and 25 of the Penal Code, the prisoner, upon the facts as found, had not committed the offence punishable under s. 471.

Queen-Empress *v.* Sheo Dayal 459

——————— *Act XLV of* 1860 *ss.* 24, 25—*Fraudulently using as genuine a forged document*—"*Dishonestly*"—"*Fraudulently*"] The creditors of a police-constable applied to the District Superintendent of Police that Rs. 2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for Rs 18, the whole amount due. It subsequently appeared that the receipt was one for Rs. 8, which had been altered by adding the figure "1," so as to make it appear that the receipt was for Rs. 18.

Held that the real intent in the prisoner's mind being to induce his superior officer to refrain from the illegal act of stopping a portion of his salary, the Court in a criminal case ought not to speculate as to some other intent over and above this that might have presented itself to him; that it did not necessarily follow that he contemplated setting up the altered receipt to defeat his creditor's claim; and that therefore he ought not to have been convicted of an offence under s. 471 of the Penal Code.

Queen-Empress *v.* Syed Husain 403

——————, s. 499. *Defamation—Communication of defamatory matter to complainant only*—"*Making*"—"*Publishing.*"] *Held* by the Full Bench (DUTHOIT, J., dissenting) that the action of a person who sent to a public officer by post in a closed cover a notice under s. 424 of the Civil Procedure Code, containing imputations on the character of the recipient, but which was not communicated by the accuser to any third person, was not such a making or publishing of the matter complained of as to constitute an offence within the terms of s. 499 of the Penal Code.

Queen-Empress *v.* Taki Husain 205

——1865—XI, s. 6. *See* Small Cause Court suit.

——1868—XVI, ss. 13, 15, 16. *See* Jurisdiction, 5.

——1870—VII, ss. 6, 12, 28 *See* Court-fees.

——————s. 17. *See* Court-fees.

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ACTS—1870—VII, sch. ii. No. 11. *See* Civil Procedure Code, ss. 322 *B*, 322 *D*.

——— — X, s. 15. *Reference by Collector to District Court—Land claimed by Collector on behalf of Government or Municipality.*] The scope and object of the Land Acquisition Act (X of 1870) is to provide a speedy method for deciding the amount of the compensation payable by the Collector, when such amount is disputed, and the person or persons to whom it is payable.

S. 15 of the Land Acquisition Act contemplates a reference when the question of the title to the land arises between the claimants who appear in response to the notice issued under s 9, and who set up conflicting claims one against another as to the land required, which the District Judge as between such persons can determine.

The Collector has no power to make a reference to the District Judge under s. 15 in cases in which he claims the land in question on behalf of Government or the Municipality, and denies the title of other claimants and the District Judge has no jurisdiction to entertain or determine such reference.

Imdad Ali Khan *v.* The Collector of Farakhabad ... 817

———1871—VI, ss. 19, 20 *See* Jurisdiction 5.

——— ——— s. 24 *See* Act XLV of 1860, s. 296. Condition restraining alienation. Missing person. Pre-emption, 8.

——— ———VIII ss. 28, 35. *See* Registration, place of.

——— ———IX, sch ii, No. 65. *See* No. 132.

——— ——— ———, No. 132. *Limitation—Periods respectively applicable to personal demands and to claims charged on immoveable property*]. That there is a personal liability upon an instrument charging a debt upon immoveable property does not carry with it the effect that the period of limitation fixed for personal demands by Act IX of 1871 is extended, by reason of this demand being thereby brought within the meaning of art. 132 of sch. ii of that Act, which applies to claims "for money charged upon immoveable property."

A mortgagee of lands sought, after the lapse of more than six years from the date when the mortgage-money was payable, to enforce two distinct remedies, the one against the property mortgaged, and the other against the mortgagor personally, on the contract to repay the mortgage-money.

Held that art. 132 above-mentioned applied only to suits to raise money charged on immoveable property out of that property: and the twelve years' bar did not apply to the personal remedy, as to which the shorter period prescribed in art. 65 of the same schedule applied.

Ram Din *v.* Kalka Prasad 502

——— ——— XXIII, s. 12. *Assignment of pension before passing of Act*] On the 12th February, 1865, *A*, who was in receipt of a *zihakhi* pension from Government, assigned by deed a portion thereof to his wife, in lieu of her dower. After his death, disputes arose between the wife and the heirs of *A* in regard to a portion of the amount thus settled on her; and she instituted a suit, on a certificate granted by the Collector under s. 6 of the Pensions Act (XXIII of 1871), in which she prayed for a declaration of her proprietary right in respect of the said money and of her power to transfer the same.

Held that the assignment of the 12th February, 1865, having been made before the passing of the Pensions Act, was not invalidated by s. 12 of that Act, which had no retrospective operation.

The former judgment of the Court in this appeal reversed.

Imtiaz Begam *v.* Liakat-un-nissa Begam 886

———1872—I, s. 3—"Fact." *See* Act I of 1872, s. 32 (1)

——— ———s. 8, Explanations 1, 2. *See* Act I of 1872, s. 32 (1).

——— ———s. 9. *See* Act I of 1872, s. 32 (1).

——— ——— ss. 26, 30. *See* Confession.

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ACTS—1872—I, s. 32 (1). *Statement as to cause of death—Cause of death signified in answer to question—Admissibility of evidence as to signs—Act I of* 1872, *s* 3, *s.* 8, *Explanations* 1, 2, *s.* 9—'*Fact*"—'*Conduct*"—"*Verbal*" *statement*] In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances in which the injuries had been inflicted on her; that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the deceased and the signs made by her in answer to such questions

Held by the Full Bench (MAHMOOD, J, dissenting) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s 32 of the Evidence Act, and were therefore admissible in evidence under that section.

Per STRAIGHT, J, that statements by the witnesses as to their impressions of what the signs meant were inadmissible and should be eliminated; but that assuming that the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, it was not straining the construction to hold that the circumstances were covered by s. 32.

Per MAHMOOD, J., that the expression "verbal statements" in s 32 should be confined to statements made by means of a word or words, and that the signs made by the deceased, not being verbal statements in this sense, were not admissible in evidence under that section.

Per PETHERAM, C. J., that the signs could not be proved as "conduct" within the meaning of s. 8 of the Evidence Act, inasmuch as taken alone, and without reference to the questions leading to them, there was nothing to connect them with the cause of death, and so to make them relevant; while the questions could not be proved either under *Explanation* 2 of s 8 or under s. 9, inasmuch as the condition precedent to their admissibility under either of these provisions was the relevancy of the conduct which they were alleged to affect or of the facts which they were intended to explain. The "conduct" made relevant by s 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons.

Per MAHMOOD, J, that the word "conduct" as used in s 8 does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact; that the signs made by the deceased were the conduct of "a person an offence against whom was the subject of any proceeding" and were relevant as such under s 8, and that the questions put to her were admissible in evidence either under *Explanation* 2 of the same section, or under s. 9, by way of an explanation of the meaning of the signs.

Queen-Empress *v.* Abdullah 385

———, s. 57 (1). *See* Act XLV of 1860, s 296.

———, ss. 63 (*c*), 114, Illustration (*g*). *Secondary evidence—Copy of a copy—Suit for redemption of mortgage—Burden of proof—Withholding evidence.*] A deed executed in 1812 became the subject of litigation resulting, on the 17th May 1813 in a decree the effect of which was to create a usufructuary mortgage of rights and interests in two villages In 1871, the purchaser of a portion of the mortgagor's rights, alleging that the mortgage debt had been liquidated from the usufruct, sued to recover possession of the property. The mortgagees resisted the claim for possession, on the grounds that, prior to the execution of the deed in 1812, the mortgagor's ancestor had granted to their own ancestor a *gawanda-dari* right, under which a fixed *jama* of Rs. 121 was payable by them in respect of the lands in

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the village ; that what was mortgaged was not the lands, but only the right to receive the fixed *jama* ; and that, therefore, the fact that the mortgage-money had been liquidated from the *jama* did not entitle the plaintiff to oust them from possession It appeared that the alleged *gawanda-pattar*, the original mortgage-deed, and the decree of the 17th May, 1813, were at one time in the defendants' possession, but the defendants alleged that all three documents were destroyed by fire in 1872 The plaintiff sought to support his case by putting in a copy on plain paper purporting to have been transcribed from a certified copy of the decree of the 17th May, 1813.

Held, with reference to the provisions of s. 63 of the Evidence Act (I of 1872), that, there being no evidence proving that the copy produced by the plaintiff had been compared with the original decree, the copy was not admissible in evidence, inasmuch as it could not be regarded either as primary or as secondary evidence of the contents of the original decree.

Held also, that the destruction or loss of the three documents alleged by the defendants to have been destroyed not being proved, their non-production placed them under the recognized prohibitions of the law of evidence, and subjected them to the presumption recognized by Illustration (*g*), s. 114 of the Evidence Act, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it

Held also that inasmuch as the plaintiff was no party to the alleged *gawanda-pattar* nor to the mortgage of 1812, nor to the litigation which resulted in the decree of the 17th May, 1813, and could not therefore be taken to be in a position to produce these documents or to prove their contents by secondary evidence ; and inasmuch as the circumstances established a *primâ facie* case in his favour the burden of proof in regard to the existence of the alleged *gawanda-dari* tenure lay upon the defendants, who, whilst in a position which would involve their being in possession of the documents above-mentioned, and whilst admitting such possession up to the year 1872, had failed to prove either their destruction or their contents by secondary evidence such as could be relied on *Rajah Kishen Dutt Ram Panday* v. *Narrendar Bahadoor Singh* referred to.

Ram Prasad *v.* Raghunandan Prasad 738

ACTS—1872—I, s. 108. *See* Missing person.

——— ———ss. 115 116 *See* Act XVIII. of 1873, s. 9.
———1872—IX, s. 2 *See* Act XVIII of 1873, s. 9. Contract.
——— ———s 10 *See* Contract.
——— ———s 11. *See* Majority. Majority, age of.
——— ———s. 23 *See* Act XVIII of 1873, s. 9. Contract.
——— ———s. 28. *See* Contract.
——— ———ss. 42, 45. *See* Debt.

——— ———ss. 69, 70. *Payment of Government revenue by person wrongfully in possession of land*] *B*, who was in wrongful possession of land which by right belonged to *K*, collected rents and paid the Government revenue. *K* eventually established her title to the property, obtained possession, and recovered the rents from the tenants, and *B* was obliged to refund the same. Subsequently *B* sued *K* to recover the sum which he had paid on account of revenue.

Held that the claim did not fall within the provisions of ss. 69 and 70 of the Contract Act, and the fact that the plaintiff had been a loser by his wrongful act, or that the defendant had been benefited by the payment he made, would give him no right of action against her. *Tiluck Chand* v. *Soudamini Dasi* referred to.

Binda Kuar *v.* Bhonda Das 660

——— ———s. 265. *See* Jurisdiction, 10.

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ACTS—1873—XV, s 38. *See* Public highway.

——— ——— XVIII, s. 9. *Sale of occupancy-rights with zamindar's consent—A ceptance of rent by zamindar from vendees—Act IX of* 1872, *ss* 2, 23—*Estoppel—Act I of* 1872, *ss.* 115, 116] Under a deed dated in 1879, the occupancy-tenants of land in a village sold their occupancy-rights, and the zamindars instituted a suit for a declaration that the sale deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants.

Held by OLDFIELD, J , that sales of occupancy-rights were not void under s. 9, Act XVIII of 1873, when made with the consent of the landlord ; that the sale which the zamindars had consented to was valid ; and that, under any circumstances, they were estopped by their conduct from bringing a suit to set aside the sale. *Umrao Begam* v. *The Land Mortgage Bank of India* referred to.

Per MAHMOOD, J.—That the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873. *Umrao Begam* v. *The Land Mortgage Bank of India* distinguished

Also *per* MAHMOOD, J.—That s. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief ; that in the present case it could not be said that the vendee was misled by the fact that the zamindars were consenting parties to the sale-deed ; that he could not plead ignorance that the deed was unlawful and void ; that it had not been shown that he acted upon the zamindars' agreement to take no action, so as to alter his position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid.

Also *per* MAHMOOD, J.—That the zamindars having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers ; and that therefore the question as to ejectment did not fall with the jurisdiction of the Civil Court.

Durga *v.* Jhinguri 511

———————. *Sale of occupancy rights with zamindar's consent—Acceptance of rent by zamindar from vendees—Act IX of* 1872 *ss.* 2, 23—*Estoppel—Act I of* 1872, *ss.* 115, 116] Under a deed dated in 1879 the occupancy tenants of land in a village sold their occupancy-rights, and the zamindars thereupon instituted a suit for a declaration that the sale deed was invalid under s. 9 of Act XVIII of 1873 (the N-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants.

Held by the Full Bench that the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873.

Held also, that s. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it and must act upon such belief ; that in the present case it could not be said that the vendees were misled by the fact that the zamindars were consenting parties to the sale-deed ; that they could not plead ignorance that the deed was unlawful and void ; that it had

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not been shown that they acted upon the zamindars' agreement to take no action, so as to alter their position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid.

Held also that the zamindars having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court.

The judgment of OLDFIELD, J. reversed and that of MAHMOOD, J. affirmed.

Jhinguri *v.* Durga 873

ACTS—1873—XVIII s. 3. *See* Landholder and tenant, 1, 2.

——————XIX, s. 13. *See* Mortgage 2.

—— ——————, s. 56. Civil Procedure Code, s. 13.

——————, ss. 62, 64. *See* Civil Procedure Code, s. 13.

——————, s. 113. *Civil and Revenue Courts—Question of proprietary right decided by Revenue Court under Act XIX of* 1873 (*N.-W. P. Land Revenue Act*), *s.* 113—*Omission by Revenue Court to frame decree —Decision of Revenue Court not open to attack by suit in Civil Court —Act XIX of* 1873, s. 113.] A Revenue Court acting under the provisions of ss. 112 and 113 of the N.-W. P. Land Revenue Act (XIX of 1873) recorded a proceeding declaring the nature and extent of the respective rights of the parties before the Court, and prescribing the mode in which partition should be effected. No decree was framed in accordance with this proceeding.

Held, that the proceeding of the Revenue Court was a decision by a Court of competent jurisdiction, and could not be interfered with by a suit in the Civil Court disputing its correctness.

Bhola *v.* Ramdhin 894

——————, s. 159. *See* Mortgage 2.

——————, s. 165. *See* Mortgage 2.

——————, ss. 194, 195. *Act VIII of* 1879, *s* 20—*Court of Wards — Disqualified proprietor—Release of property from superintendence of Court.*] *M*, a female proprietor, brought a suit to recover possession of certain lands which were in the hands of the Collector, as manager of the Court of Wards, on the allegations that she had placed the property in the hands of the Court some years previously because she was not at that time in a position to manage it herself, but that she was now apable of managing it, and desired to get it back. The suit was dismissed, and the plaintiff appealed on the ground, *inter alia*, that inasmuch as she was not a "disqualified proprietor' within the meaning of Act XIX of 1873 (N.-W. P. Land Revenue Act), the Court of Wards had no jurisdiction to take the property, and that its possession was merely the result of an arrangement to which she was a consenting party, and which she now desired to terminate.

Held that, with reference to the provisions of Act XIX of 1873 and Act VIII of 1879 (N.-W P Land Revenue Acts), the suit as brought was not maintainable, inasmuch as there was no evidence that the plaintiff had obtained the previous sanction of the Local Government to the release of the property from the superintendence of the Court of Wards as required by s. 20 of the latter Act,

Held also, that the plaintiff could not be allowed in appeal entirely to change the nature of the grounds upon which she alleged herself to be entitled to claim relief, and that hence she could not now raise the plea that the Court of Wards, in taking the property under its management, had acted without jurisdiction.

The expression "Local Government" in ss 194 and 195 of Act XIX of 1873 and s 20 of Act VIII of 1879 means the Lieutenant-Governor of the North-Western Provinces,

Masuma Bibi *v.* The Collector of Ballia 687

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ACTS—1873—XIX, s. 241 *See* Jurisdiction, 8.
——— ———, s. 241, (*f*). *See* Jurisdiction, 9.
——— ———, s 241 (*g*). *See* Civil Procedure Code, s 13.
——— ———, s 241 (*h*). *See* Jurisdiction, 4.
———1875—IX. *See* Majority, age of.
——— ———, s 2 (*c*). *See* Majority.
———1877—I, s. 42. *Suit to set aside a decree on the ground of fraud.*] Subsequent to a decree for partition of an ancestral estate, the creditors of one of the parties thereto who, from the time of the suit, had borrowed money from them on the security of his rights and interests in the estate, brought a suit against their debtor and obtained a decree for the moneys due to them. They then sued all the parties to the partition for a declaration that the decree then passed was, so far as it affected their (the plaintiffs') interests, fraudulent and collusive and of no effect

Held that the suit was not maintainable.

Ram Sarup *v* Rukmin Kuar 884

———. *See* Landholder and tenant, 5. Sale in execution of decree.

———1877—III, s. 50. *Registered and unregistered documents—Mortgagee under registered deed not entitled to priority over holder of subsequent decree on prior unregistered deed.*] The mortgagee under an unregistered hypothecation bond, of which the registration was optional, obtained a decree thereon, and, in execution of such decree, attached the hypothecated property

Held, with reference to the terms of s 50 of the Registration Act (III of 1877), that the bond, having merged in the decree, was entitled to take effect against a registered bond relating to the same property, and which was executed subsequently to the unregistered bond, but prior to the decree. *Kanhaiya Lal* v. *Bansidhar* and *Shahi Ram* v. *Shib Lal* distinguished.

Baijnath *v.* Lachman Das 888

———. *See* Civil Procedure Code, s 295. Mortgage, 4.
———XV, s. 4. *See* Appeal, memorandum of.
——— ———s 5. *See* Pre emption, 2.
——— ———s 10. *See* Trust.
——— ———s 19. *See* Execution of decree, 6.
——— ———s 22. *See* Set-off.
——— ———sch. ii, No. 10. *See* Pre emption, 13.
——— ———, No. 52. *See* Set-off.
——— ———, No. 53. *See* Set off.
——— ———, No 62. *See* Trust
——— ———, No. 83. *See* Set-off.
——— ———, No. 89. *See* Trust.
——— ———, No. 120 *See* Pre-emption, 13. Trust.
——— ———, No. 132. *Suit for money charged on rents and profits—Suit for money charged on immoveable property.*] *K* borrowed from *C* a sum of Rs. 571, and at the same time executed a bond, whereby he mortgaged usufructuarily to his creditor his "entire right and share" in a particular estate, in lieu of the above mentioned sum; and it was agreed that *C* might realize the debt from the rents and profits of two years, and that, as soon as it had been realized, his possession should cease.

Held that the money borrowed by *K* was "money charged upon immoveable property," it being charged upon rents and profit *in alieno solo* which, in English law, would be classed as "incorporeal hereditaments," but which in the law of India are included in immoveable property; and that therefore the limitation applicable to a suit for the recovery of the money was provided in No. 132, sch. ii of Act XV of 1877 (Limitation Act). *Dulli* v. *Bahadur* and *Pestonji Bezonji* v. *Abdool Rahiman* dissented from; *Maharana Fetehsangji Jaswantsangji* v. *Desai Kulliannraiji Hakoomatkraiji* referred to, *Lallubhai* v. *Naran* followed.

Muhammad Zaki *v* Chatku 120

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ACTS—1877—XV, sch. ii, No. 156. *See* Pre-emption, 2.

——————, No. 164] Where a property had been attached in execution of a decree,—*held* that the date on which the property was attached, and not the date of the sale in execution, being the date of executing the first process for enforcing the decree, was the date from which limitation should be computed under art. 164, sch. ii of Act XV of 1877 *Pachu* v. *Jakishen* referred to.

A Court which admits an application to set aside a decree *ex parte* after the true period of limitation has expired acts, in the exercise of its jurisdiction, illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision by the High Court under that section *Amir Hasan Khan* v. *Sheo Bakhsh Singh* and *Magni Ram* v *Jiwa Lal* commented on by MAHMOOD, J.

Per MAHMOOD, J —The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hasan Khan* v. *Sheo Bakhsh Singh* must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority.

Har Prasad *v.* Jafar Ali 345

——————, No. 171 *B.* *See* Appeal, abatement of

——————, No. 178. *See* Execution of decree, 2.

—————— No 179. *Execution of decree—Application for "step in aid of execution"—Application by pleader for execution after decree-holder's death*] Where a decree-holder died without taking out execution of his decree, and, two days after his death, his pleader made an application for execution on his behalf, this being the first application of the kind,—*held* that, inasmuch as the authority of a pleader ceases at the moment of his client's death, the application was invalid, and was not such an application or step in aid of execution of the decree as could save a subsequent application for execution by the decree-holder's heirs from being barred by limitation,

Kallu *v.* Muhammad Abdul Ghani 564

—————— . *See* Execution of decree, 1.

——————, No. 179 (2). "*Decree*"—*Order rejecting memorandum of appeal for deficiency of court-fee.*] An appeal from a decree dated the 8th July, 1879, was rejected by the High Court on the 11th June, 1880, in consequence of the failure of the appellants to pay additional court-fees declared by the Court to be leviable. On the 23rd December, 1882, an application was filed by the decree-holder for execution of the decree.

Held, with reference to Act XV of 1877 (Limitation Act), sch. ii, No. 179 (2), that the order of the 11th June, 1880, rejecting the appeal on the ground of deficient payment of court fee, was equivalent to a decree, and therefore the application, being made not more than three years from the date of that order, was not barred by limitation.

Rup Singh *v.* Mukhraj Singh 887

——————No. 179 (4) *Execution of decree—Application withdrawn by decree-holder—Limitation—Civil Procedure Code, ss* 374, 647] The holder of a decree for money dated the 7th June, 1879 applied on the 20th July, 1880, for execution thereof, but it appeared that in certain particulars the decree required correction, and it was therefore ordered, at the request of the pleader for the decree-holder, that the application should be dismissed and the decree returned to him for amendment. The next application for execution of the decree was made by the decree-holder on the 19th February, 1883.

Held that the application of the 20th July, 1880, having been put in and afterwards taken back by the decree-holder, the proceeding became to all intents and purposes as though no application had been made; that therefore it could have no effect as an application made in accordance with law for execution within the meaning of art. 179,

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sch. ii, of the Limitation Act; that applying the rule contained in s. 371 of the Civil Procedure Code, in accordance with s. 647, to the application for execution of the 19th February, 1883, the question of limitation must be determined as if the first application had never been filed; and that the application now in question was consequently barred by limitation. *Ramanandan Chetti* v. *Periat-mbi Shervai* dissented from. *Pirjade* v. *Pirjade.*

Kifayat Ali *v.* Ram Singh 359

ACTS—1877—XV., sch. ii, No 179 (4). *Execution of decree—Limitation—Transmission of decree for execution—Application for execution of attached decree—"Step in aid of execution"—Civil Procedure Code, ss.* 223, 228, 273.] A decree was passed on the 20th February, 1878, by the Munsif of *M.* In November 1878, it was in accordance with the provisions of s. 223 of the Civil Procedure Code, transferred to the Munsif of *J.* On the 21st January, 1879, an application for execution of the decree was made to the Munsif of *J*, who thereupon issued an order for the attachment of some immovable property belonging to the judgment-debtor and also for the attachment of three decrees standing in his Court in favour of the judgment-debtor against other persons. On the 18th March, 1882, the decree-holder applied to the Munsif of *J* to execute one of these decrees in his behalf, and he further asked that whatever might be realized in such execution should go to the account of the decree which had been transferred and which was being executed.

Held that the application of the 18th March, 1882, was perfectly legal, and such a proceeding as could keep alive the decree of the 20th February, 1878, and that a subsequent application for execution dated the 12th April, 1883, was therefore not barred by limitation.

An application to execute an attached decree is a "step in aid of execution" of the original decree, within the meaning of art, 179, sch. ii, of the Limitation Act, inasmuch as its object is to obtain money in order to pay off the judgment-debtor.

Lachman *v.* Thondi Ram 382

——————. *"Step in aid of execution of decree."*] *R*, in a suit against *S* and other persons, obtained a decree on the 24th December, 1878, *S* being exempted from the decree and being awarded costs against the plaintiff. In executing his decree, *R*, on the 16th June, 1880, sought to set off the costs awarded to *S* against the amount due to himself. On the 6th August, 1880, *S* preferred objections to this course. On the 19th July, 1883, *S* applied for execution of his decree for costs.

Held that the application was barred by limitation, inasmuch as art. 179 (4) of the Limitation Act requires that the decree holder should make a direct and independent application for execution on his own account, and it was not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case.

Shib Lal *v.* Radha Kishen 898

——————, No. 179 (6) *See* Execution of decree 10.

—— 1879—VIII, s. 20. *See* Act XIX of 1873, ss. 194, 195.

——————XVIII s. 12. *Conviction of Pleader of criminal offence—Case reported to the High Court—Argument allowed to show that conviction was illegal.*] A District Judge reported to the High Court for orders the case of a pleader who had been convicted of cheating under s. 417 of the Penal Code, and who, in the opinion of the District Judge, was unfit to be allowed to practice.

Upon the hearing of the case, counsel was permitted to go behind the conviction in order to show that the acts of the pleader did not amount at law to the offence of cheating.

In the matter of Durga Charan, Pleader 290

——1881—XII, s 2. *See* Landholder and tenant, 2.

——————, s. 7. *Usufructuary mortgage—Ex-proprietary tenant—Sir land*]. *Held* by the Full Bench (OLDFIELD and BRODHURST, JJ.,

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dissenting) that a person who creates a usufructuary mortgage of zamindari property becomes an ex-proprietary or occupancy tenant of the sír land under s. 7 of the N-W. P. Rent Act (XII of 1881).

Per PETHERAM, C J.—A usufructuary mortgagee is for the time being the proprietor of the property, inasmuch as a proprietor is the person entitled to exclusive possession at the time; and the intention of the Legislature, as expressed in s 7 of the Rent Act, is that when a zamindar ceases to be entitled to occupy the sír land as proprietor, he shall have the right to occupy it as an ex-proprietary tenant under s. 5. *Bhagwan Singh* v. *Murli Singh* dissented from.

Per STRAIGHT, J.—The words "lose" and "part with" in s. 7 of the Rent Act were intended to cover all cases in which a proprietor of land has either voluntarily or by operation of law deprived himself, permanently or temporarily, of the power to exercise full proprietary right over his property.

Per MAHMOOD, J.—The meaning of the words "proprietary right" in s. 7. of the Rent Act is equivalent to that of the term "full ownership," corresponding to *dominium* in the Roman law and fee-simple estate in English law. The right of a usufructuary mortgagee cannot be called proprietorship; and having regard to s. 58 of the Transfer of Property Act, the execution of a usufructuary mortgage does not amount to a transfer of the proprietary right

The word "lose" as used in s. 7 of the Rent Act means the transfer of proprietary rights otherwise than by the will of the owner in consequence of some incident of law. The term "part with" is a general expression, including both absolute and temporary alienation, and a usufructuary mortgage is a "parting with" some of the incidents of ownership and falls within the purview of s 7, inasmuch as the rights of possession and of the enjoyment of the usufruct are transferred from the mortgagor to the mortgagee, though such a transfer does not amount to a total alienation of proprietorship. *Bhagwan Singh* v. *Murli Singh* dissented from; *Gopal Panday* v. *Parsotam Das*, *Ganga Din* v. *Dhurandhar Singh* and *Gulab Rai* v. *Indar Singh* referred to.

Per OLDFIELD, J —The words "lose or part with his proprietary rights in any mahal" in s. 7 of the Rent Act, mean a loss or parting which divests absolutely of all proprietary right, leaving no interest of a proprietary kind in the mahal; this does not happen in a usufructuary mortgage, and therefore the latter is not a loss of or parting with proprietary rights within the meaning of s 7. *Bhagwan Singh* v. *Murli Singh* approved.

Per BRODHURST, J.—The word "lose" in s. 7 of the Rent Act means involuntarily lose, as, for instance, by auction-sale, and "part with" means voluntarily and entirely divested of by means, *e g*, of gift or private sale. "Proprietary rights" mean the whole of the proprietary rights; and a usufructuary mortgagor of zamindari property cannot be said to have lost or parted with his proprietary rights therein, and therefore does not, under the provisions of s. 7 of the Rent Act, become an ex-proprietary or occupancy-tenant of the sír land.

Indar Sen *v.* Naubat Singh 553

ACTS—1881—XII, ss. 7, 9. *Sír land—Sale of sír land by co-sharer—Validity of transfer—Ex-proprietary tenant—Right of occupancy*] *Held* by PETHERAM, C. J., and STRAIGHT, OLDFIELD, and BRODHURST, JJ., that the question whether the proprietary rights of a co-sharer in the *sír* of a mahal are distinct and separate from the proprietary rights in the mahal itself, so as to enable the owner of one share to sell and give possession of his *sír* alone as against his co-sharers, must be determined with reference to the tenure and conditions under which land is held in the mahal by the co-parceners, to be ascertained in each case.

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Per PETHERAM, C. J., and STRAIGHT and OLDFIELD, JJ.—In zamindari tenures, in which the whole land is held and managed in common, a co sharer cannot convey his right of occupancy in the *sîr* as something distinct from his proprietary rights in the mahal. In pattidari tenures in which the lands are divided and held in severalty, each proprietor managing his own lands, there may be lands which come within the classification of *sîr* given in the Rent Act, but they would not seem to be on a different footing from any other land held in severalty by a proprietor.

Per BRODHURST, J.—So long as a person is the sole proprietor of a mahal, he is not restrained by any law from effecting a sale of his proprietary rights in his *sîr* land, even though he retains possession of the whole of the other lands of the mahal.

Per MAHMOOD, J.—That the proprietary rights of a joint co-sharer in his *sîr* land form an essential part of his rights in the mahal; that such proprietary rights in the *sîr* land may be sold, but that the purchaser under such a sale could not obtain any such possession as would operate in defeasance of the ex-proprietary right in such *sîr* land conferred by s. 7, and secured by s. 9 of the Rent Act. *Sahib Ram* v. *Kishen Singh, Hazari Lal* v. *Ugrah Rai, Gulab Rai* v. *Indar Singh,* and *Tirmal Singh* v. *Bhola Singh* referred to.

Sital Prasad *v.* Amtul Bibi 633

ACTS—1881—XII, s 8. *See* Landholder and tenant, 6. Mortgage, 1.
———————, s. 9. *See* Landholder and tenant, 1, 2, 6. Occupancy tenant.
———————, s. 10. *See* Jurisdiction, 6.
———————, s. 30. *See* Jurisdiction, 4.
———————, s. 31. *See* Landholder and tenant, 1.
———————, s. 93 (*b*). *See* Occupancy-tenant.
———————, s. 93 (*d*). *See* Jurisdiction, 1.
———————, s. 93 (*h*). *Village expenses—Expenses of cultivating sîr land held in partnership by plaintiff and defendant.*] A recorded co-sharer of a mahal sued the lambardar for his share of the profits of the mahal for the year 1286 fasli At the time of the institution of the suit the profits for 1287 and 1288 also were due, but no claim was then made in respect of them. The suit was struck off on account of the non-appearance of the parties under s 140 of Act XII of 1881 (N.-W. P. Rent Act), with leave to the plaintiff to bring a fresh suit Subsequently, the plaintiff brought a suit against the same defendant for his share of the profits of the mahal for 1287 and 1288 fasli.

Held that the suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

Held also, that the Courts below had properly refused to deduct from the plaintiff's claim as "village expenses," within the meaning of s. 93 (*h*) of the Rent Act, certain charges on account of the expenses of cultivation of *sîr* land held in partnership by the plaintiff and the defendant.

Mulchand *v.* Bhikari Das 624

———————. "*Recorded co-sharer.*"] *Held* that a co-sharer of a mahal whose share was recorded in "*shamilat*" with all the other pattidars, but was not specifically defined in the *khewat* in a fractional or separate form, was a "recorded co-sharer," within the meaning of s. 93 (*h*) of the N.-W. P. Rent Act (XII of 1881).

Shib Shankar Lal *v.* Banarsi Das 891

——————— s 95 (*a*). *See* Jurisdiction, 6.
——————— s. 95 (*c*). *See* Jurisdiction, 4.
——————— s. 95 (*n*). *See* Jurisdiction, 3, 7.
——————— s. 140. *See* Civil Procedure Code, s. 43.
——————— s. 149. *See* Occupancy-tenant.
——————— XXVI, ss. 35, 43. *See* Majority, age of.

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ACTS—1882,—IV, s. 2. *See* Condition restraining alienation.
——————— s 10. *See* Condition restraining alienation.
——————— s 54. *See* Pre-emption, 14
——————— s 58. *See* Pre emption, 7.
——————— ss. 86, 88. *See* Execution of decree, 7.
——————— s, 100 *See* Pre-emption, 15
——————— s. 106. *See* Landholder and tenant 3, 4.
——————— s 111. *See* Landlord and tenant, 3.
——————— VIII, s 4. *See* Criminal Procedure Code, s 35.

ADJUSTMENT OF DECREE, uncertified. *See* Contract.

ADMISSION by co-defendant.] In a suit for possession of immoveable property brought by three Muhammadan brothers, their three sisters were impleaded as defendants under s. 32 of the Civil Procedure Code, and two of the latter subsequently filed a written statement, in which, after stating that they were on good terms with their brothers, the plaintiffs and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would, on some future occasion, "settle with their own brothers as to their right and costs." The third sister did not appear to defend the suit.

Held that the lower Courts were wrong in treating this admission as sufficient to entitle the plaintiffs to a decree for possession, not only of their own share, but also of the shares of their three sisters, it being a fundamental proposition connected with the administration of justice that the plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right or delegate the authority to one for more than his own share in property. *Lachman Singh* v. *Tansukh* referred to.

Azizullah Khan *v.* Ahmad Ali Khan 353

ALLUVION. *Execution of decree - Decree for money—Property not attached—Such property not sold in execution—Submersion of contiguous estate.*] *F* owned a share in a village *M*, which in 1875 was divided into two separate mahals, *K* and U, and Government revenue was separately assessed on each mahal In 1876, *K* was entirely submerged by the Ganges. On the 20th September, 1877, *F's* share was sold in execution of a decree, and the auction purchaser was put in possession. In the sale certificate the village *M* was named, without specific mention of either of the two mahals, and the Government revenue referred to was the amount assessed on *U* only. Subsequently the river receded and part of *K* was again left dry, and it was treated by the revenue authorities as having accreted by alluvion to *U* in the proprietary possession of the auction-purchaser.

Held that this view was erroneous, inasmuch as, before the auction-sale of 20th September, 1877, the two properties were separate, being separately assessed with revenue, and the incidents of the ownership of one could not affect the ownership of the other, and since there was no such rule of law as would justify the proposition that simply because two mahals are contiguous, and one of them is liable to be submerged, therefore it is nothing more or less than an accretion to the other.

Held also, inasmuch as the mahal *K* being at the time under water, was not attached in execution of the decree against *F* and was not advertized for sale, and the revenue assessed thereon was not referred to in the sale-procedings, and the sale-certificate contained no reference to it as the property sold, the sale of the 20th September, 1877, did not convey any rights to the auction-purchaser in respect of *K*. *Mahadeo Dubey* v. *Bhola Nath Dichit* referred to.

Fida Husain *v.* Kutub Husain 33

ALLUVIAL LAND. *See* Civil Procedure Code, s. 320.
"ANCESTRAL" PROPERTY. *See* Civil Procedure Code, s. 320.

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APPEAL. *Decree—Judgment—Objections by respondent to decree—Res judicata—Civil Procedure Code, ss. 13,540, 561, 584.*]—In a suit to obtain possession of certain property and to set aside a deed called a deed of endowment (*wakf-nama*), on the ground that the defendant had fraudulently obtained its execution, the defendant pleaded (1) that the deed was a valid one, and (ii) that she was in possession of the property in satisfaction of a dower-debt, and her possession could not be disturbed so long as the debt remained unsatisfied The Court of first instance held that the deed was invalid, but the defendant was entitled to remain in possession of the property till her dower-debt was satisfied, and the Court passed a decree which merely dismissed the suit, without embodying the finding as to the deed. On appeal by the plaintiff to the District Judge, the defendant filed objections under s. 561 of the Civil Procedure Code in regard to the first Court's decision that the deed of endowment was invalid The Judge dismissed the plaintiff's appeal, affirming the finding as to dower, and, refusing to decide the question of the validity of the deed as being unnecessary for disposal of the claim, disallowed the defendant's objections. The defendant appealed to the High Court.

Held by the Full Bench (OLDFIELD and MAHMOOD, JJ., dissenting) that if a decree is, upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable, and nothing else, that party has no right of appeal therefrom. If in the judgment of which such decree is the formal expression, findings have been recorded upon some issues against that party, and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s. 561 of the Civil Procedure Code or of appealing therefrom under s. 540, he must take steps under s. 206 to have the decree properly brought into confirmity with the judgment, so that there may be matters on the face of it to show that something has been decided against him; but if he fails to take this course, the decree, though in general terms, will stand good as finally deciding the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself rested.

The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of, as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by s 13 of the Civil Procedure Code.

Held also that, in the present case, the Judge was right in holding that the question as to the validity or otherwise of the deed of endowment was wholly immaterial.

The judgment of STRAIGHT, J., in *Lachman Singh* v. *Mohan* approved and followed.

Per OLDFIELD, J., *contra*, that the decree, to agree with the judgment and fulfil the requirements of s 206 of the Civil Procedure Code, should contain the material points for determination arising out of the claim and material for the decision thereon; that if this has not been done the defect is a good ground of appeal, notwithstanding that the decree, on its face, may be altogether in favour of the appellant, and notwithstanding that he may not have applied for amendment of the decree under s. 206, or for review of judgment; and that, in the present case, the defect in the decree would afford a good ground of appeal.

Per MAHMOOD, J., that inasmuch as the provisions of s. 13 of the Civil Procedure Code relate as well as to the trial of issues as to the trial of suits, and in the present case the validity or otherwise of the deed was a matter directly and substantially in issue between the parties, and was adjudicated upon, the finding of the first Court upon that issue was not a mere *obiter dictum*, but would be binding upon

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the defendant as *res judicata*, notwithstanding the fact that the suit against her was dismissed on the ground that she held possession of the property in lieu of dower; that whatever has the force of *res judicata* is necessarily appealable; that the word "from" as used in s. 540 or s. 584, and the expression "objection to the decree" in s 561, refer not only to matters existing, upon the face of the decree, but also to those which should have existed, but do not exist there; and that the defendant in the present case was aggrieved or injured by the omission in the decree of the first Court, and was therefore entitled to file objections to it, and for the same reason, to appeal to the High Court from the decree of the lower appellate Court.

Also *per* MAHMOOD, J., that it was doubtful whether the reliefs contemplated by ss. 206 and 623 were open to the defendant; but that, even conceding that she ought to have sought her remedy under either of those sections, her neglect to do so did not make her incapable of obtaining the same result by the exercise of her right of appeal.

Anusuyabai v. *Sakkaram Pandurang*, *Man singh* v. *Narayan Das*, *Mohan Lal* v. *Ram Dayal*, *Niamat Khan* v. *Phadu Buldia* and *Pan Kuar* v. *Bhagwant Kuar* referred to.

Jamaitunnissa *v.* Lutfunnissa 606

APPEAL. *See* Civil Procedure Code, ss. 311, 312: ss. 322*B*, 322*D*. Practice. Remand.

——, ABATEMENT OF. *Death of plaintiff-respondent—No application for substitution of deceased's representative—Civil Procedure Code, ss.* 368, 582—*Act XV of* 1877 *sch.* ii, *art* 171 *B*] *Held* by the Full Bench (MAHMOOD, J., dissenting), that s. 582 of the Civil Procedure Code does not make the provisions of Chapter XXI relating to the death of a defendant in a suit applicable to the death of a plaintiff respondent in an appeal, so as to render it obligatory on the defendant-appellant to make an application to the Court praying that the legal representatives of the deceased be made parties to the appeal; and that, where there has been no such application, the appeal does not abate.

Per PETHERAM, C.J.—The words "so far as may be" in the second clause of the first paragraph of s. 582, must be construed as meaning "so far as may be necessary to carry into effect the remedies contemplated by Chapter XXI."

Per MAHMOOD, J., *contra*, that the object of s. 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of Chapter XXI, so as to make them applicable to appeals, and the words "appellant" and "respondent" as used in the section include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court; that Chapter XXI applies to cases where a plaintiff-respondent has died; and that, in such a case, and where no application has been made, within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates.

Also *per* MAHMOOD, J.—The word "defendant" as used in art. 171 B of the Limitation Act (XV of 1877) must be taken to include a respondent, whether plaintiff or defendant in the suit.

Lakshmibai v. *Balkrishna*, *Rajmonee Dabee* v. *Chandar Kant Sandel*, and *Bai Javer* v. *Hathising Kesrising* referred to.

Narain Das *v.* Lajja Ram 693

——. *Application for declaration of insolvency—Appeal from order rejecting application—Death of decree-holder-respondent—No application by appellant for substitution of deceased's representative—Act XV of* 1877, *sch.* ii, *No* 171 *B—Civil Procedure Code ss.* 344-348, 350, 351, 368, 553, 582, 590.]—The decree-holder respondent in an appeal from an order refusing an application by

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the judgment debtor for declaration of insolvency under s. 344 of the Civil Procedure Code, died, and the judgment-debtor, appellant, took no steps to have the legal representative of the deceased substituted as respondent in his place

Held that art 171 B., sch. ii of the Limitation Act (XV of 1877) applied to the case, and that, as no one had been brought on the record to represent the deceased respondent within the period prescribed, the appeal must abate.

Per MAHMOOD, J, that whatever the position of the parties might have been in the regular suit, in the insolvency proceedings the judgment-debtor occupied a position analogous to that of a plaintiff, and the decree-holder occupied the position of a defendant.

Narain Das v. *Lajja Ram* distinguished.

Rameshar Singh *v.* Bisheshar Singh 731

APPEAL, MEMORANDUM OF. *Civil Procedure Code, ss* 2, 54 (*c*), 582, 622 "*Decree*"—*Order rejecting plaint—Plaint held to include memorandum of appeal—Order rejecting appeal—Act XV. of* 1877, *s.* 4—*High Court's powers of revision.*] An order rejecting a memorandum of appeal as barred by limitation is a "decree" within the meaning of s. 2 of the Civil Procedure Code; it is therefore appealable, and not open to revision by the High Court under s. 622 of the Code.

Gajraj Singh v. *Bhagwant Singh* and *Dianatullah Beg* v. *Wajid Ali Shah* distinguished.

Gulab Rai *v* Mangli Lal 42

APPEAL, SECOND. *Finding on issue of fact remitted—Civil Procedure Code, ss.* 565, 566, 568.]—*Held* by the Full Bench (TYRRELL, J., dissenting), that the findings upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined. *Nivath Singh* v. *Bhikki Singh* referred to.

Per PETHERAM, C. J. and TYRRELL, J., (STRAIGHT, J., dissenting).—Ss 565 and 566 of the Civil Procedure Code are, as far as may be incorporated in Chapter XLII of the Code relating to second appeals, and when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is the duty of the High Court, on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand.

Per STRAIGHT, J.—S. 587 of the Civil Procedure Code does not mean that the provisions of Chapter XLI relating to first appeals are to be applied indiscriminately or in their entirety to second appeals, and implies no warrant for the decision by the High Court of questions of fact in any shape or at any stage of a second appeal. *Ramnarain* v. *Bhawanidin* and *Sheoambar Singh* v. *Lallu Singh* referred to.

Per TYRRELL, J.—The jurisdiction of Courts of second appeal in respect of questions of fact is restricted, insomuch as the appeal may not be entertained on "grounds" of fact, but, under the circumstances of s. 566 of the Code, no less than under the abnormal circumstances contemplated by the ruling of the Full Bench in *Nivath Singh* v. *Bhikki Singh*, the High Court may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. An issue to be tried in this way will, with all the evidence bearing upon it, be open to consideration from any point of view that may be present to the Court on the evidence and otherwise. In cases where the Court, still acting under s. 566, has been obliged in the absence of evidence on the record to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby, or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court—the term "finding" being

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used in s. 566 in its restricted sense of an answer to the proposition referred for inquiry, and not of an award or decision of the issue before the Court.

Balkishen *v.* Jasoda Kuar 765

APPEAL, SECOND. *See* Civil Procedure Code, s 584.

APPORTIONMENT. *See* Mortgage, 5.

ARBITRATION. *Refusal of arbitrators to act—Civil Procedure Code, s.* 510] It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act; and the finality of the award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them.

Where certain matters were referred to arbitrators who refused to act, and the Court of first instance passed an order directing them to proceed and to make an award, and they, on the passing of such order, made an award,—*held* that all proceedings taken by the arbitrators in obedience to the order of the Court directing them to arbitrate against their will were null and void.

Shibcharan *v.* Ratiram 20

ARBITRATION. *Remand under Civil Procedure Code, s.* 566 *for trial of issues—Reference by first Court of whole case to arbitration—Refusal of arbitrator to act—Award by remaining arbitrators—Illegality of award—Civil Procedure Code, s.* 510] A Court of first instance to which issues have been remitted under s. 566 of the Civil Procedure Code by the appellate Court has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference of the case to arbitration, which is only within the jurisdiction of the appellate Court. *Gossain Dowlut Geer* v. *Bissessur Geer* referred to,

When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and, above all, at the last meeting when the final act of arbitration is done, is essential to the validity of the award.

Where a case was referred by a Court to the arbitration of three persons, and the parties to the reference agreed to be bound as to the matters in dispute by the decision of a majority of the arbitrators, and one of the arbitrators subsequently refused to act, and withdrew from the arbitration,—*held* that the Court could not pass a decree on the award of the remaining arbitrators, and could only, under s. 510 of the Civil Procedure Code, appoint a new arbitrator or supersede the arbitration and proceed with the suit. *Kazee Syud Nasir Ali* v. *Musammat Tinoo Dossia* and *Rohilkhand and Kumaun Bank* v *Row* referred to.

Nand Ram *v.* Fakir Chand 523

———————. *Setting aside award—Corruption or misconduct of arbitrator—Revocation of submission to arbitration—Civil Procedure Code, s.* 508] An award cannot be set aside by the Court on the mere surmise that the arbitrator has been partial.

After the parties to a suit have agreed to refer to arbitration and the order of reference has been made by the Court under s 508 of the Civil Procedure Code, neither of them can arbitrarily and on no sufficient ground withdraw from the agreement.

Pesto jee Nassurwanjee v. *Manockjee & Co* followed.

Nainsukh Rai *v.* Umadai 273

BOND. *Interest—Covenant for rate of interest after due date of bond.*] In a deed of mortgage, dated in July, 1870, the mortgagors covenanted, among other things, as follows :—" That, having repaid the principal amount in the course of three years, we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of Re. 1-2 per cent. per mensem; that, should we in any year

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fail to pay the amount of interest, it shall, at the close of the, year be consolidated with the principal amount, and we shall pay compound interest at Re. 1-2 per cent. per mensem .....that, in the event of non payment of the principal and interest on the expiration of the appointed time, the " mortgagee " shall be at liberty to recover from us the whole amount due to him with interest by means of a law suit "

Held that the terms of the bond amounted to a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due ; that, the bond containing an express covenant for the payment of interest at that rate, the interest was not affected by the considerations of the reasonableness or otherwise of the rate ; and that the mortgagee was therefore entitled to interest up to the date of the decree at the rate of Re. 1-2 per mensem. *Baldeo Panday* v *Gokal Rai* referred to.

Chhab Nath *v.* Kamta Prasad 333

BOND. *See* Debt.
BURDEN OF PROOF. *See* Act I of 1872, ss. 63 (*c*), 114, (*g*) Limitation.
CAUSE OF ACTION. *See* Declaratory decree 1, 2.
CHARGE. *See* Pre emption, 15.
CHARGE, ALTERATION OF. *See* Magistrate, powers of.
CHARGES, ALTERNATIVE. *See* Act XLV of 1860, s. 193.
CHEQUE *See* Majority, age of.
CIVIL AND REVENUE COURTS. *See* Jurisdiction, 1, 2, 3, 4, 6, 7, 8, 9.
CIVIL PROCEDURE CODE, s. 2. *See* Appeal, memorandum of.
——— ——— ——— s 11. *See* Jurisdiction 10.

——— ——— ——— s. 13. *Res judicata—Act XIX of* 1873, *ss* 56 62, 64, 241 (*g*)]. *Held* that an order by a Settlement Officer directing that certain persons should be recorded as the sub-proprietors of certain land, as they claimed to be, and not as lessees, as certain persons asserted that they were, did not operate as *res judicata* in a suit by the latter persons against the former for a declaration that the former were not sub-proprietors of the land, but lessees thereof, the Settlement Officer not being competent, under Act XIX of 1873 (N.-W. P. Land-Revenue Act), to try such a question of right.

Tota Ram *v.* Har Kishan 224

——— ——— ——— . *Civil Procedure Code, s.* 45—*Res judicata—Matter directly and substantially in issue—Meaning of "suit" in s.* 13.] *S* sued *K* for four bonds, alleging that the same had been satisfied. *K* had formerly sued *S* on two of these bonds. *S* had alleged in defence of that suit that those two bonds, as also the other two, had been satisfied. It was decided in that suit that not one of the bonds had been satisfied.

Held by PETHERAM, C J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ., that, the only issue in the former suit which had to be decided being whether the bonds on which that suit was brought had been satisfied or not, the second suit was, under s. 13 of the Civil Procedure Code, *res judicata* only in respect of those bonds, and not in respect of the other two bonds.

The Court which tried the former suit had not jurisdiction to try the subsequent suit

Per MAHMOOD, J.—This being so, if the word "suit" in s. 13 were taken literally, it might with some plausibility be contended that there was no *res judicata* in respect of any of the bonds. The word "suit," however, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 45, which enables the plaintiff to unite several causes of action in one and the same suit.

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Adopting this interpretation, it was clear that the two bonds which were the subject of the former suit could not be allowed to form the subject of litigation again.

As to the other two bonds, which were not the subject-matter of the former suit, they did not, in the former suit, constitute a matter "directly and substantially in issue," within the meaning of s 13; and even if they were "directly and substantially in issue," the decision in the former suit would not support the plea of *res judicata*, because the Court which tried that suit was not a Court of jurisdiction competent to try the subsequent suit in which the plea was raised.

Sheoraj Rai *v* Kashi Nath 247

CIVIL PROCEDURE CODE, s. 13. *See* Appeal.

———, s. 15. *See* Jurisdiction, 5.

———, s 25. *See* Jurisdiction, 5.

———, s. 30. *See* Mosque.

———, s. 43 *Act XII of* 1881 (*N.-W. P. Rent Act*), *s.* 140—*Case struck off with liberty to plaintiff to bring a fresh suit—Omission to sue for part of claim in case struck off—Fresh suit for omitted claim not barred.*] A recorded co-sharer of a mahal sued the lambardar for his share of the profits of the mahal for the year 1286 fasli. At the time of the institution of the suit the profits for 1287 and 1288 fasli also were due, but no clain was then made in respect of them. The suit was struck off on account of the non-appearance of the parties under s. 140 of Act XII of 1881 (N.-W. P. Rent Act), with leave to the plaintiff to bring a fresh suit. Subsequently, the plaintiff brought a suit against the same defendant for his share of the profits of the mahal for 1287 and 1288 fasli.

Held that the suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

Held also that the Courts below had properly refused to deduct from the plaintiff's claim as "village expenses," within the meaning of s. 93 (*h*) of the Rent Act, certain charges on account of the expenses of cultivation of *sir* land held in partnership by the plaintiff and the defendant.

Mulchand *v.* Bhikari Das 624

———, ss. 43, 44. *See* Court-fees.

———, s. 45. *See* Civil Procedure Code, s 13.

———, s. 53. *Practice—Rejection &c., of plaint at a date subsequent to first hearing.*] *Held* (OLDFIELD, J, dissenting) that, under s. 53 of the Civil Procedure Code, a plaint can be rejected, returned for amendment, or amended by the Court of first instance only at or before the first hearing of the suit, and not after the first hearing thereof.

Modhe v. *Dongre* dissented from.

Soorjmukhi Koer's Case, *Burjore* v. *Bhagana* and *Fazul-un nissa Begam* v. *Mulo* distinguished by MAHMOOD, J.

Per MAHMOOD, J.—The plaint may, for causes other than those mentioned in s 53, be amended by the Court after the first hearing.

Damodar Das *v* Gokal Chand 79

———, ss. 54 55, 584. *See* Court-fees.

———, s. 54 (*c*). *See* Appeal, memorandum of.

———, s. 57 (*a*) *See* Jurisdiction 5.

———, ss. 64, 100, 108, 157. *See Ex parte* decree.

———, ss. 98, 99, 647. *See* Practice.

———, s 108. *See* Civil Procedure Code, s. 136.

———, s. 111. *See* Set-off.

———, s. 136. *Civil Procedure Code*, s 108—*Decree against defendant under s* 136—"*Ex parte*" *decree*]—A defendant failing to comply with an order to answer interrogatories, the Court, under s. 136 of the Civil Procedure Code, struck out his defence, and, proceeding *ex parte*, passed a decree against him. *Held* that the decree could not be treated, in respect of the remedy by appeal, as an *ex parte* decree, and therefore, under the ruling in *Lal Singh* v. *Kunjan* not appealable, but that an appeal would lie from the decree.

Chunni Lal *v.* Chamman Lal 159

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CIVIL PROCEDURE CODE, CHAPTER XV, s. 191. *Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor—Civil Procedure Code, s. 198*] A Subordinate Judge, having taken all the evidence in a suit before him, and having completed the hearing of the suit, except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree.

Held that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides, and the arguments on behalf of both, and then finally decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor to be put in; and that, in neglecting to take this course, and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities.

Jagram Das *v* Narain Lal 857

———————, s. 198. *See* Chapter XV, s. 191.

——————— s. 206. *Civil Procedure Code, s. 622—Order amending decree—High Court's powers of revision.*] *Per* OLDFIELD, J.—When an original decree is amended under s. 206 of the Civil Procedure Code, it as amended is the decree in the suit; and an appeal therefore lies from it under the provisions of s. 540, when the validity of the amendment can be questioned.

The matter of amending a decree under s. 206 does not by itself constitute a "case" within the meaning of s. 622 of the Civil Procedure Code, but forms part of the proceedings in the suit in which the decree is made.

Held, therefore, *per* OLDFIELD, J., that, where an original decree, which was appealable, was amended by the Court of first instance, under s. 206 of the Civil Procedure Code, the High Court had no power to revise such amendment under s. 622 of the Code.

Per MAHMOOD, J.—An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and cannot alter its date, and such an order is not appealable under s. 588 of the Code. Such an order, therefore, can be revised by the High Court, under s. 622.

Raghunath Das *v.* Raj Kumar 276

———————. *Civil Procedure Code, s 622—Order amending decree—High Court's powers of revision*] A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say that he accepted the appeal, and that the decree as it stood failed to give effect to the judgment.

Per OLDFIELD, J.—That the order passed by the Judge under s. 206 could not be made the subject of revision by the High Court under s. 622 of the Civil Procedure Code, because there was an appeal from the amended decree, which became the decree in the suit and superseded the original decree.

Per MAHMOOD, J.—That an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under

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s. 588. Also that, in saying that by "dismissed," his predecessor meant "decreed" the Judge had altered the decree in a manner not warranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Code, and that the Court was consequently competent to revise his order

Raghunath Das v. *Raj Kumar* referred to.

Surta *v.* Ganga 411

CIVIL PROCEDURE CODE, s. 206. *See* High Court's powers of revision.

———————, ss. 206, 209. *Amendment of decree—Judgment awarding interest for period prior to suit—Decree directing interest to be paid from date of suit.*] The judgment in an appeal adjudged interest to be paid for the period prior to the institution of the suit only. The decree contained an order for payment of interest from the date of the suit onwards.

Held that no variance with the judgment, within the meaning of s 206 of the Civil Procedure Code, was involved in the additional order contained in the decree

Kolai Ram *v.* Pali Ram 755

———————, ss. 213, 215. *See* Jurisdiction, 10.

———————, s. 223. *See* Act XV of 1877, sch. ii, No. 179 (4).

———————, s 228. *See* Act XV of 1877, sch ii, No. 179 (4). Execution of decree, 16.

———————, s. 230. *See* Execution of decree, 9.

———————, s 232. *See* Execution of decree, 3.

———————, s. 239. *See* Execution of decree, 16.

———————, s. 243. *See* s 244 (*c*).

———————, s. 244. *Question for Court executing decree—Plaintiff suing in a character separate from that in which decree was passed against him—Separate suit not barred.*] A judgment-debtor, upon the attachment of certain land in execution of decrees passed against him personally by the Revenue Court, instituted a suit for declaration and establishment of his right to such land, not as his own property, but as *wakf*, of which he was *mutawalli* or trustee

Held that inasmuch as the plaintiff was not suing in his own right, but in his capacity as custodian, trustee, or manager of the *wakf* property, and he must therefore be taken to fill a character separate from that in which the decrees were passed against him by the Revenue Court, his suit was not barred by the provisions of s. 244 of the Civil Procedure Code. *Madho Prakash Singh* v. *Murli Manohar* and *Shankar Dial* v. *Amir Haidar* referred to.

Nath Mal Das *v.* Tajammul Husain 36

———————. *Mesne profits—Decree for possession of immoveable property—Reversal of decree on appeal—Appellate decree silent as to mesne profits—Suit for recovery of mesne profits.*] The plaintiff in a suit for possession of immoveable property obtained a decree for possession thereof, and in execution of the decree obtained possession of the property. This decree was subsequently reversed on appeal by the defendant. The decree of the appellate Court was silent in respect of the mesne profits which the plaintiff had received while in possession. The defendant instituted a suit to recover those profits.

Held, per PETHERAM, C. J., OLDFIELD, BRODHURST, and DUTHOIT, JJ., that the suit was not barred by s. 244 of the Civil Procedure Code, the question raised by such suit, although it might have arisen out of the decree of the appellate Court, not "relating to the execution, discharge or satisfaction of the decree," within the meaning of that section, (because, at that time, no such question had arisen or was in existence), and therefore not one in respect of which a separate suit is barred by that section.

Partab Singh v *Beni Ram* distinguished by OLDFIELD, J.

Per MAHMOOD, J.—That the suit was not barred by s. 244, the mesne profits sought to be recovered not having been realized in execution of the decree reversed on appeal.

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Per DUTHOIT, J.—The words in cl. (*c*) of s. 244, "any other questions arising, &c" should be read as "any other questions *directly* arising"; otherwise the most remote inquiries would be possible in the execution department.

Ram Ghulam *v.* Dwarka Rai 170

CIVIL PROCEDURE CODE, s. 244. *Decree for possession of immoveable property—Execution of decree—Reversal of decree on appeal—Mesne profits—Civil Procedure Code, s. 583.*] *G* obtained a decree against *R* for possession of a house, and in execution thereof obtained possession. On appeal, the decree was set aside by the High Court, whose decree did not direct that the appellant should be restored to possession and was silent as to mesne profits.

Held, that with reference to s 583 of the Civil Procedure Code, *R* was entitled to recover possession of the property in execut on of the High Court's decree, but that, with reference to the decision of the Full Bench of the Court in *Ram Ghulam* v. *Dwarka Rai*, he could not, in execution of that decree, recover mesne profits

Gannu Lal *v.* Ram Sahai 197

——— ——— ———. *Questions for Court executing decree—Party to suit—Representative.*] Where certain property was attached in execution of a decree passed upon a bond against the legal representatives of the obligor, and the judgment-debtors objected to the attachment on the ground that the property was not part of the obligor's estate and liable to be taken in execution of the decree, but was property which they could claim in their own right,—*held* that the matter in dispute was one between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree within the meaning of s 244 of the Civil Procedure Code, and was therefore to be determined in the execution department and not by regular suit. *Chowdry Wahed Ali* v. *Musammat Jumaee, Shankar Dial* v. *Amir Haidar*, and *Nath Mal Das* v. *Tajummul Husain* referred to.

Per MAHMOOD, J.—That the turning point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment debtor in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property.

Kanai Lall Khan v. *Sashi Bhuson Biswas* dissented from.

Ram Ghulam *v.* Hazaru Kuar 547

——— ——— ———. *Question for Court executing decree—Party to suit—Representative.*] Where, certain property having been attached in execution of a decree, the representative of the judgment-debtor objected that the property had been acquired by himself and not inherited from the judgment-debtor, and was therefore not liable in execution,—*held* that the question was one which must be decided in the execution department under s. 244 of the Civil Procedure Code. *Ram Ghulam* v. *Hazaru Kuar* referred to.

Sita Ram *v.* Bhagwan Das 733

——— ——— ———. *See* Civil Procedure Code, s. 583. Execution of decree 3, 4, 14. High Court's powers of revision, 4.

——— ——— ——— s. 244 (*c*). *Ex cution of decree—Civil Procedure Code, ss.* 243, 545—*Order in stay of execution a matter "relating to execution" of decree—Order appealable—Order restoring judgment-debtor to possession after execution—Order illegal.*] The provisions of s. 244 of the Civil Procedure Code govern equally the procedure of the Court which passed the decree when executing such decree,

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and the Court to while the decree is sent for execution. *Cooke* v. *Hiseeba Beebee* referred to.

All orders staying execution of decrees, whether passed by the Court which passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s 244 (*c*) of the Civil Procedure Code, and, as such, appealable, irrespective of the provisions of s. 588. *Kristomohiny Dossee* v. *Bama Churn Nay Chowdry* and *Luchmeeput Singh* v. *Seeta Nath Doss* followed.

The widest meaning should be attached to clause (*c*) of s. 244 of the Civil Procedure Code, so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree and relating to its execution.

There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of s. 243 of the Civil Procedure Code have no reference to a case in which execution has already been carried out, and the decree-holder placed in possession of the property decreed to him

Ghazidin *v.* Fakir Bakhsh 73

CIVIL PROCEDURE CODE, s. 244 (*c*). *See* Contract.

——————, ss. 244, 278, 283, 311. *See* Sale in execution of decree.

——————, s. 258. *See* Contract. Execution of decree, 6, 10.

——————, s 273. *See* Act XV of 1877, sch. ii, No. 179 (4).

——————, s. 274. *See* Execution of decree, 12, 13.

——————, s 276. *See* Execution of decree, 12.

——————, s. 278. *See* Execution of decree, 4, 19.

—————— s. 283. *See* Suit for personal property.

——————, s. 290. *See* Execution of decree, 18.

——————, s. 295. *Suit for refund of proceeds of execution-sale—Small Cause Court suit—Mortgage—First and second mortgagees—Act III of* 1877, *s.* 50] *S* and *L* held mortgage bonds executed in their favour by the same person. *S's* bond was dated the 16th June, 1882, and was registered, the registration being compulsory. *L's* bond was of prior date, the 30th December, 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August, 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May, 1883, notwithstanding that *S* claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument, and therefore entitled to priority. *S*, being dissatisfied with this order, brought a suit to recover from *L* the moiety of the sale proceeds paid to him.

Held that the suit being one to compel the defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him, was expressly allowed to be brought under the provisions of the penultimate paragraph of s. 295 of the Civil Procedure Code, and could not be regarded as a suit of the nature cognizable in a Court of Small Causes.

Held also that the registered bond of the plaintiff took effect as regards the property comprised in it against the defendant's unregistered bond under s. 50 of the Registration Act (III of 1877), which gave priority to the incumbrance created by the former bond over the incumbrance created by the latter, and this priority was not

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effected by the subsequent decrees obtained on the bonds, which only gave effect to the respective rights under the bonds.

The meaning of s. 295 of the Civil Procedure Code is that when immoveable property is sold in execution of decrees ordering i s sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority.

Shahi Ram *v.* Shib Lal 378

CIVIL PROCEDURE CODE, s. 295. *See* Execution of decree, 12.

——————, s. 311. *See* Execution of decree, 18.

——————, ss. 311, 312. *Execution of decree—Sale in execution—Order disallowing objections to sale—Order confirming sale—Appeal—Civil Procedure Code, ss.* 313, 314, 588 (16)] *Per* PETHERAM, C. J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ.—An order passed under the first clause of s. 312 of the Civil Procedure Code, after an objection made under the provisions of s. 311 has been disallowed, is appealable under art. (16) of s. 588.

Per MAHMOOD, J.—An application made under s. 311 can be disposed of only under s. 312, and if the Court rejects the objection to the sale, the order must be regarded as an order "refusing to set aside a sale of immoveable property" under the 1st paragraph of s. 312, and therefore appealable as falling under the purview of art. (16) of s. 588.

Lalman v. *Russu Lal* and *Rajan Kuar* v. *Lalta Prasad* dissented from by MAHMOOD, J.

Tota Ram *v.* Khub Chand 253

——————, ss. 311, 312. *See* Execution of decree 14, 19.

——————, ss. 313, 314. *See* Civil Procedure Code, ss. 311, 312.

——————, s. 320. *Rules prescribed by Local Government—Notification No.* 671 *of* 1880, *dated the* 30*th August,* 1880—"*Ancestral" property—Alluvial land—"Ancestral" riparian property—Alluvial land held on same title as riparian land*] *Held* that the ownership of alluvial land which had accreted to a riparian village must rest upon the same title as that upon which the original village was held, and that as the riparian village was ancestral, the accreted property must be ancestral also.

Ram Prasad Rai *v.* Radha Prasad Singh 402

——————. *See* Execution of decree, 5.

——————, ss. 322B, 322 D. *Dispute as to extent of judgment-debtor's liability to claim—Appeal from order disposing of dispute—Nature of appeal—Act VII of* 1870, *sch.* ii, *No.* 11.] An appeal from the decision of a dispute under s. 322B of the Civil Procedure Code falls directly within the exception of art. 11, sch. ii of the Court Fees Act (VII of 1870), and the memorandum of appeal should therefore be presented as for a decree in a suit upon an *ad valorem* stamp.

Srinivasa Ayyangar v *Pria Tambi Nayahar* dissented from.

Ahmad Khan *v.* Madho Das 565

——————, s. 351 (*a*). *Insolvent judgment-debtor—Accidental false statement in application.*] Before rejecting an application by a judgment-debtor for a declaration of insolvency with reference to the provisions of s. 351 (*a*) of the Civil Procedure Code, it is necessary that the Court should be satisfied that the applicant has wilfully made false statements: unintentional inaccuracies are not sufficient grounds for rejection.

Karim Bakhsh *v.* Misri Lal 295

——————, s. 351 (*b*). *Insolvent judgment debtor—"Property"—Fraudulent intent.*] S. 351 (*b*) of the Civil Procedure Code contemplates a case of active concealment, transfer, or removal of substantive property since the institution of the suit in which was

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passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division; and it does not cover an omission by the judgment-debtor, in his application for a declaration of insolvency, of a statement as to his right to demand partition of ancestral estate in which he is a sharer, especially where there is no evidence of any intent to defraud.

Sukrit Narain Lal *v.* Raghunath Sahai 445

CIVIL PROCEDURE CODE, s. 368. *See* Appeal, abatement of.

———, s. 374. *See* Act XV of 1877, sch. ii. No. 179 (4).

———, s. 407 (*c*). *Suit* in formâ pauperis—*Rejection of application—"Right to sue"—Limitation.*] Where an application for leave to sue as a pauper was rejected with reference to s. 407 (*c*) of the Civil Procedure Code on the ground that the claim was barred by limitation, and therefore the applicant had no right to sue, *held* by the Full Bench that the Court had acted within its powers, and that its jurisdiction not having been exercised illegally or with material irregularity, the High Court had no power of interference in revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Singh* referred to.

The terms of s. 407 (*c*) of the Code must not be read as limiting the Court's discretion to merely ascertaining whether the "right to sue" arose within its jurisdiction, but have a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of limitation or any other law.

Per MAHMOOD, J.—The word "case" as used in s. 622 of the Civil Procedure Code should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal subject to the rules governing the exercise of the appellate and revisional jurisdictions respectively; and it comprehends adjudications under s. 407, which fall under the same general category of adjudications as the rejection of an ordinary plaint under s. 53 or s. 54 *Phul Singh* v. *Jagan Nath, Bhulneshri Dat* v. *Bidiadhis*, and *Sital Sahu* v *Bachu Ram* referred to.

Also *per* MAHMOOD, J.—The provisions of s. 407 must be interpreted strictly, inasmuch as they operate in derogation of the right possessed by every litigant to seek the aid of the Courts of Justice; and an exercise of jurisdiction under that section, when such exercise of jurisdiction is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. *Har Prasad* v. *Jafar Ali* and *Ammal* v. *Nayudu* referred to.

Chattarpal Singh *v.* Raja Ram 661

———, s. 443 *See* Majority, age of.

———, ss. 492, 494. *Temporary injunction—Stay of sale in execution of decree—Practice—Notice to opposite party.*] Where a Court made an order granting a temporary injunction under s 492 of the Civil Procedure Code, without directing notice of the application for injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex-parte*, without the other side being given an opportunity to show cause, *held* that the order was irregular.

Where ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, *held* that inasmuch as what was advertised to be sold was the rights and interests of the plaintiff's father in the property, and it could not be said that the property was being "wrongfully sold in execution of a decree" and the application on the face of it disclosed no sufficient ground to warrant an order under s 492 of the Civil Procedure Code being made as prayed, the temporary injunction ought not to have been granted.

Amolak Ram *v.* Sahib Singh 550

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CIVIL PROCEDURE CODE, s. 508. *See* Arbitration.
——— ——— ———, s. 510. *See* Arbitration.
——— ——— ———, s. 539. *See* Mosque.
——— ——— ———, ss. 540, 561, 584. *See* Appeal.
——— ——— ———, s. 545. *See* s. 244 (*c*).
——— ——— ———, s. 549. S. 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance, and an application should not be granted under that section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal, if it should be dismissed. *Maneckji Limji Mancherji* v. *Goolbai* followed. *Ross* v. *Jaques*, *Seshayyangar* v *Jainulavadin*, and *Jogendro Deb*, *Roykut* v *Funindro Deb Roykut* referred to.
Lakhmi Chand *v.* Gatto Bai 542
——— ———, ss. 562, 564. *See* Pre-emption, 13.
——— ———, ss. 562, 564, 566. *See* Remand.
——— ———, ss 565, 566. *See* Appeal, second.
——— ———, s. 568. *See* Appeal, second.
——— ———, s. 578. *See* Jurisdiction, 5.
——— ———, s. 582. *See* Appeal, abatement of. Appeal, memorandum of.
——— ———, s. 583. *Reversal of decree—Repayment of money realized—Restitution—Interest—Question for Court executing decree—Fresh suit—Civil Procedure Code, s.* 244,] In a suit for redemption of a mortgage, a decree was passed for possession by redemption, on the plaintiff paying the sum of Rs. 43,625-7-0, the amount of the mortgage debt. Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage, and the plaintiff paid the above-mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs. 43, 625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the amount payable on redemption was reduced to Rs. 22, 155. The plaintiff then took out execution of the decree to recover from the defendant the difference between the two sums with interest.

Held that the effect of the appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the appellate Court's decree, and that the question was clearly one for determination by the Court executing the decree and not by separate suit, being expressly provided for by s. 583 of the Civil Procedure Code.

Held also that the decree-holder was entitled to restitution of the amount with interest.

Roger v. *The Comptoir d'Escompte de Paris* referred to. *Ram Ghulam* v. *Dwarka Rai* distinguished by MAHMOOD, J.
Jaswant Singh *v.* Dip Singh 432
——— ———. *See* Civil Procedure Code, s 244.
——— ———, s. 584. *Second appeal—Grounds impugning findings of fact.*] *Held* by the Full Bench (PETHERAM, C J., dissenting) that, under s. 584 (*c*) of the Civil Procedure Code, it is competent for the High Court to entertain pleas in second appeals which impeach the findings of fact recorded by the lower appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived.

Where a lower appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds or has stated no intelligible reasons for arriving at its findings of fact, the High Court may take notice of all such matters in

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second appeal. *Futtehma Begam* v. *Mohamed Ausur*, *Assanullah* v. *Hafiz Muhammad Ali* and *Lal Mahomed Bepari* v. *Shoila Bewa* referred to.

Per PETHERAM, C. J.—The High Court is not at liberty in second appeal to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly, inasmuch as no question of fact is included in the grounds of appeal allowed by s. 584 of the Civil Procedure Code, and it would seem that the intention of the Legislature was that in small causes the findings of the lower Courts on questions of fact should be absolutely final.

By "specified law" in clause (*a*) of s. 584 is meant the statute law, and by "usage having the force of law" the common or customary law of the country or community, and the clause is confined to cases in which the lower appellate Courts have either misconstrued a statute or written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties. Clause (*b*) can only refer to mistakes in law, and does not extend the operation of clause (*a*). The term "procedure" in clause (*c*) means the practice followed by the Courts in the trial of cases, and cannot be construed as including the mental process by which a Court comes to a conclusion upon a question of fact

Per MAHMOOD, J.—That the Legislature, by framing s. 574 of the Civil Procedure Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal; and a judgment of a Court of first appeal which falls short of due compliance with the various clauses of s. 574, is essentially defective, and may properly be made the subject of complaint in second appeal under s 584. *Ramnarain*, v. *Bhawanidin*, and *Sheoambar Singh* v. *Lallu Singh* referred to.

The word "procedure" in clause (*c*) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code, or any other law regulating the investigation of cases by the Civil Courts.

When the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceeded upon an improper conception of the exact effect and bearing of the case upon the merits On the other hand, when the Court of first appeal, while adjudicating with due compliance with the provisions of s 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the lower appellate Court open to second appeal under cl (*c*) of s 584, so long as the error was substantial enough to have possibly affected the justice of the case upon the merits

Nivath Singh *v.* Bhikki Singh } 649
Bhikki Singh *v.* Nivath Singh }

CIVIL PROCEDURE CODE, s 584. *See* Remand. Court-fees.

——— ——— ——— ———, s. 588 (16). *See* Civil Procedure Code, ss. 311, 312.

——— ——— ——— ———, s. 588 (28). *See* Remand.

——— ——— ——— ———, s. 590. *See* Remand.

——— ——— ——— ———, s. 617. *High Court, reference to—Final decree or order.*] A Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, made an order returning the plaint for

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presentation to the proper Court. An appeal was preferred under s. 588 of the Civil Procedure Code to the District Judge, who, entertaining doubts upon the question of jurisdiction, referred the matter to the High Court, under s. 617.

Held that, inasmuch as the order of the Munsif was not a final decree in the suit, and any order of the Judge in appeal disposing of the plea of jurisdiction would not amount to a "*final*" decree within the meaning of s. 617 of the Civil Procedure Code, the H gh Court had not jurisdiction to entertain the reference.

Ramphul *v.* Durga 815

CIVIL PROCEDURE CODE, s. 622 *High Court's powers of revision*] In a suit to enforce the right of pre-emption in respect of a usufructuary mortgage of immoveable property, the plaintiffs alleged that the consideration-money was less then that stated in the mortgage deed. The Court of first instance gave the plaintiffs a decree for possession of the property, on payment of an amount less than that mentioned in the deed, and this decree was affirmed on appeal. The mortgagees appealed to the High Court on the following grounds :—" (i) Because it was for the respondents to prove that any portion of the consideration was not paid. (ii) Because the lower Court has not considered the evidence of the appellants. (iii). Because the finding of the lower Court is based on conjecture."

Held, on the question whether such grounds, not being grounds no which a second appeal is allowed by Chapter 42 of the Civil Procedure Code, the appeal should not proceed rather under Chapter 46, s. 622 of that Code, that the appeal could not proceed under s 622 of the Civil Procedure Code in consequence of the decision of the Privy Council in *Amir Hasan Khan* v. *Sheo Baksh Singh* that only questions relating to the jurisdiction of the Court could be entertained under that section.

Magni Ram *v.* Jiwa Lal 336

———— ———— ————. *High Court's powers of revision—"Jurisdiction"—Limitation*] A Court which admits an application to set aside a decree *ex parte* after the true period of limitation has expired acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision by the High Conrt under that section. *Amir Hasan Khan* v. *Sheo Baksh Singh* and *Magni Ram* v. *Jiwa Lal* commented on by MAHMOOD, J.

Per MAHMOOD, J.—The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hasan Khan* v. *Sheo Baksh Singh* must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority.

Har Prasad *v.* Jafar Ali 345

———— ———— ————. *See* Appeal, memorandum of. Civil Procedure Code, s. 206. Execution of decree 5. High Court's powers of revision.

———— ———— ————, s. 647. *See* Act XV of 1877, sch ii, No. 179 (4).

———— ———— ————, sch. IV, Form No. 113. *See* Jurisdiction, 10.

———— ———— ———— No. 141. *See* Execution of decree 12.

"COMPLAINT." *See* Criminal Procedure Code, s. 195.

CONDITION RESTRAINING ALIENATION. *Transfer of property—Inheritance—Act IV of* 1882, *ss.* 2, 10—*Act VI of* 1871, *s.* 24] In a suit for possession of certain shares in certain villages, a compromise was effected between the plaintiffs and *B* the defendant. The terms of the compromise were embodied in a deed, the terms of which were (*inter alia*) as follows :—"The said *B* will hold possession as a

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proprietor, generation by generation, without the power of transferring in any shape .....The following shares recorded in *B's* name shall not be transferred or sold in auction in payment of any debt payable by the said *B*, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer and to obtain possession." *B* obtained possession of the shares allotted to him by the compromise. Subsequently certain creditors of *B* attached the shares referred to in the deed in execution of a decree obtained against the heirs of *B* for money lent to *B* on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them. The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment.

Held by OLDFIELD, J., that the deed of compromise passed an absolute estate to *B* and his heirs to which the law annexed a power of transfer, and that, in reference to s 10 of the Transfer of Property Act, the stipulation against alienation on *B's* part, or against sale by auction in execution of decrees against him, was void.

Per MAHMOOD, J.—That the rule contained in s. 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession or inheritance, to be governed by s. 24 of the Bengal Civil Courts Act; that it was for those objecting to the attachment to show that, under the Hindu law the rights of *B* in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that, the Hindu law being silent on this subject, the principles of justice, equity, and good conscience must be applied, to which, so far as transfer was concerned, effect was given by s. 10 of the Transfer of Property Act; that the restrictions imposed by the deed of compromise upon *B's* powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognized; and that *B* must be held to have an absolute estate which would devolve upon his heirs and which could be sold in execution of decrees for his debts.

The *Tagore Case* referred to

Bhairo *v.* Parmeshri Dayal 516

CONDITIONAL DECREE, "finality" of. *See* Pre emption, 2.

CONFESSION. *Act I of* 1872 (*Evidence Act*) *ss.* 26, 30] The word "confession" as used in the sections of the Evidence Act relating to confessions must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt.

Queen-Empress *v.* Jagrup 646

CONSIDERATION. *See* Contract.

CONTRACT. *Consideration—Uncertified adjustment of decree—Civil Procedure Code, ss.* 244 (*c*), 258—*Act IX of* 1872 *ss.* 2, 10, 23, 28] The consideration for a mortgage consisted partly of the amount of two decrees held by the mortgagee against the mortgagor. The mortgagee having sued to enforce the mortgage, the mortgagor pleaded failure of consideration as a bar to the enforcement of the mortgage. This plea was based on the allegation that the mortgagee had not certified the adjustment of the decrees as provided by s. 258 of the Civil Procedure Code, and they were still in force under the terms of that section.

Per DUTHOIT, J, that the failure of the mortgagee to certify the adjustment of the decrees did not constitute a failure of consideration, because he did not covenant to certify such adjustment, and it was not, in fact, necessary for him to do so; because he could not seek execution of the decrees on the ground that, though unsatisfied, they were still in force under s. 258 of the Civil Procedure Code, without becoming liable to penalties; and because if the mortgagor considered the entering up of the adjustment of the decrees to be imperative, he had his remedy by application to the Court in the terms of s. 258.

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Per MAHMOOD, J, that the adjustment of a decree out of court, if never certified to the Court, is, under s. 258, ineffectual only so far as the execution of the decree is concerned; that there is nothing in the ontract Act to make such an adjustment invalid as the consideration for an agreement; that an agreement founded on such consideration may be enforced without defeating the objects of s. 258; and that consequently there was, in respect of the amount of the decrees, valid consideration for the mortgage.

Gunamani Dasi v. *Pran Kishori Dasi*, *Meer Mahomed Kazem Jowharry* v. *Khetoo Bibee*, *Guni Khan* v *Koonjo Behary Sein*, *Davlata* v. *Ganesh Shashtri*, *Shadi* v. *Ganga Sahai*, and *Sita Ram* v. *Mahipal* followed. *Patankar* v. *Devji* and *Pundurang Ramchandra Chowghule* v. *Narayan* dissented from

Ramghulam *v.* Janki Rai 124

CONTRACT. *See* Debt. Majority. Majority, age of.

——— ——superseding decree. *See* Execution of decree 6.

CO-SHARERS. *See* Pre-emption 16, 17.

COSTS. *See* Declaratory decree 1.

COURT-FEES *Act VII of* 1870, *ss.* 6, 12, 28—*Order requiring additional court fee on claim, passed subsequent to decree—Decree prepared so as to give effect to subsequent order—Civil Procedure Code ss.* 54, 56, 584.] A Judge, after disposing of an appeal on the 1st March, 1883, again took it up, and on the 21st March, 1883, directed the appellant to pay additional court-fees on her memorandum of appeal On the 2nd May, 1883, the appellant paid the additional court-fees under protest, and a decree was then prepared, bearing date the 1st March, 1883 but it referred to and carried into effect the subsequent order of the 21st March and the 2nd May.

Per MAHMOOD, J, that as soon as the Judge had passed the decree of the 1st March, 1883, he ceased to have any power over it, and was not competent to introduce new matters not dealt with by the judgment; that the order of the 21st March and the deposit of the 2nd May, whether right or wrong, were not proceedings to which effect could be given in the antecedent decree of the 1st March. 1883; and that the decree was *ultra vires* to that extent, and was therefore liable to correction in second appeal under s. 584 of the Civil Procedure Code.

The powers conferred by ss. 54 (*a*) and (*c*) and 55, read with s. 582 of the Civil Procedure Code, or by s. 12 of the Court-Fees Act (VII of 1870) read with clause (ii) of s 10, are intended to be exercised before the disposal of the case, and not after it has been decided finally so far as the Court is concerned.

The powers conferred by s 28 of the Court-Fees Act cannot be exercised by an order passed after the decision of the case to which the question of the payment of court-fees relates, and, even assuming that they can be so exercised, such an order, though it may be subject to such rules as to appeal or revision as the law may provide, cannot be given effect to by making insertions in an antecedent decree.

Per OLDFIELD, J—That the Court had power to make the order it did, inasmuch as the collection of court-fees was no part of a Judge's functions in the trial of a suit which could be said to have ceased with its determination; and the provisions of the Court-Fees Act fixed no time within which the presiding Judge could exercise his power of ordering documents to be stamped, and seemed, on the other hand, to contemplate the exercise of that power at any time subsequent to the receipt, filing or use of a document, and to make the validity of the document and the proceedings relative thereto dependent on the document being properly stamped.

Mahadei *v.* Ram Kishen Das 528

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COURT-FEES. *Suit for profits in respect of several years—Distinct causes of action—Distinct subjects—Act VII of* 1870 (*Court-Fees Act*), *s.* 17—*Civil Procedure Code, ss.* 43, 44.] In an appeal in a suit for recovery of profits under s. 93 (*h*) of the N.-W. P. Rent Act, in respect of several years, the proper court-fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year.

Muhammad Malik Khan *v.* Nirhai Bibi 761

COURT OF WARDS. *See* Act XIX of 1873, ss 194, 195.

CRIMINAL PROCEDURE CODE, s 17. *See* s. 437.

———, *s.* 35. *Convictions of rioting and causing grievous hurt—Offences distinct—Separate sentences not illegal—Criminal Procedure Code s.* 235—*Act VIII of* 1882, *s.* 4—*Act XLV of* 1860, *ss.* 147, 325.] The offences of rioting, of voluntarily causing hurt, and of voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences within the meaning of s. 35 of the Criminal Procedure Code.

Under the first paragraph of s. 235 of the Criminal Procedure Code, a person accused of voluntarily causing grievous hurt may be charged with and tried for each offence at one trial, and, under s. 35, a separate sentence may be passed in respect of each. *Queen-Empress* v. *Ram Partab* dissented from.

Queen-Empress *v.* Dungar Singh 29

———, s. 39 *See* Magistrate, powers of.

———, s. 55. *See* Act XLV of 1860, ss. 224, 225.

———, ss. 110, 117, 118. *See* Act XLV of 1860, ss. 224, 225.

———, s. 195- "*Sanction*"—"*Complaint*"—*Criminal Procedure Code, s.* 476.] On the 2nd August, 1884, a Munsif, who was of opinion that in the course of a suit which had been tried before him, certain persons had committed offences under ss. 193, 463, and 471 of the Penal Code, and that the prosecution of these persons was desirable, made an order which he described as passed under s. 643 of the Civil Procedure Code, and in which he directed that the accused should be sent to the Magistrate, and that the Magistrate should inquire into the matter. In May, 1885, upon an application by one of the accused to the District Court to "revoke the sanction for prosecution granted by the Munsif," it was contended that the "sanction" had expired on the 2nd February, 1885, and had ceased to have effect.

Held by the Full Bench that the Munsif's order, whether it was or was not a sanction, was a sufficient "complaint" within the meaning of s. 195 of the Criminal Procedure Code, and that the limitation period prescribed by that section was not applicable to the case.

Per PETHERAM, C. J., and STRAIGHT, J.—That, considering that s. 643 of the Civil Procedure Code was closely similar to s. 476 of the Criminal Procedure Code, the Munsif's order might be taken as having been passed under the latter section.

Also *Per* PETHERAM, C. J., and STRAIGHT, J.—The words in s. 195 of the Criminal Procedure Code, "except with the previous sanction or on the complaint of the public servant concerned," must be read in connection with s. 476, which was enacted with the object of avoiding the inconvenience which might be caused if a Munsif, or a Subordinate Judge, or a Judge were obliged to appear before a Magistrate and make a complaint on oath, like an ordinary complainant, in order to lay the foundation for a prosecution. The language of s. 476 indicates that where *a Court* is acting under s. 195, a complaint in the strict sense of the Code is not required

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and that the procedure therein laid down constitutes the "complaint" mentioned in s. 195.
Ishri Prasad v. Sham Lal 871

CRIMINAL PROCEDURE CODE, s. 233. *See* s. 234.

——— ———, s 234. *Criminal Procedure Code, ss. 233, 234—Joinder of charges—Offences of the same kind committed in respect of the same person.*] Where a postmaster was accused of having, on three different occasions within a year, dishonestly misappropriated moneys paid to him by different persons for money-orders, *held* that, the offences of which such person was accused being the dishonest misappropriations by a public servant of public moneys, (for as soon as they were paid they ceased to be the property of the remitters), such offences were "of the same kind," within the meaning of s. 234 of the Criminal Procedure Code, and such person might, therefore, under that section, be charged with and tried at one trial for all three offences.
Empress v. *Murari* observed on.
Queen-Empress v Juala Prasad 174

——— ———, s. 235. *See* s. 35. Magistrate, powers of. Offence made up of several offences.

——— ———, s. 288 *Trial before Court of Session—Evidence given before committing Magistrate used at trial to contradict witnesses.*] S 288 of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself *Queen* v. *Amanulla* referred to.
A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate, the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth.
In a case in which the Sessions Court had neglected to apply the above rules, STRAIGHT, J quashed the conviction.
Queen-Empress v. Dan Sahai 862

——— ———, s 338. *Tender of pardon to accomplice who has pleaded guilty—Accomplice—Evidence—Corroboration.*] A Court of Session, under s 338 of the Criminal Procedure Code, tendered a pardon to an accused person charged jointly with two others for the same offence, who had pleaded guilty. The tender was accepted and such person was examined as a witness against the other accused. *Held* that the tender of pardon was not improperly made, and the evidence of the approver was admissible.
Per DUTHOIT, J.—The word "supposed" in s 338 must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man, who, although admitted to be a party to the crime, is unconvicted.
Queen-Empress v. Kallu 160

——— ———, s. 369 *See* Review of judgment.

——— ———, ss. 435, 437. *Power of District Magistrate to direct further inquiry by Magistrate of the first class.—"Inferior Magistrate"*] Where a District Magistrate called for the record of a case in which a Magistrate of the first class had discharged certain accused persons, and directed another Magistrate of the first class to make further inquiry into the case, *held*, following *Nobin Kristo Mookerjee* v. *Russick Lal Laha* and *Queen-Empress* v. *Nawab Jan*, that the District Magistrate's order was *ultra vires* and illegal.
Jhinguri v. Bachu 131

——— ———, s. 437. *"Inferior"—"Subordinate"—First class Magistrate "subordinate" to Magistrate of District—Criminal Procedure Code, ss 17, 435.*] A Magistrate of the first class is within

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the meaning of s. 437 of the Criminal Procedure Code, "subordinate" to the Magistrate of the District, who is therefore competent to call for the record of the former, and to deal with it under s. 437.

Queen-Empress *v* Laskari 853

CRIMINAL PROCEDURE CODE, s. 439. *High Court's powers of revision —Revision of case in which term of imprisonment has been served.*] The High Court is competent, in the exercise of its powers of revision under s. 439 of the Criminal Procedure Code, to intertere with a conviction, even though, in consequence of the expiry of the sentence, it may not be possible to interfere with the latter.

Queen-Empress *v.* Sinha 135

———————————, s. 476. *See* s. 195.

———————————, sch. V., No. XXVIII (4). *See* Act XLV of 1860, s. 193.

DEBT. *Bond—Inheritance—Hindu Law—Right of one of several heirs to sue creditor for share of debt—Contract—Obligation—Act XXVII of* 1860—*Act IX of* 1872, *ss.* 42, 45] *Held* by the Full Bench (MAHMOOD, J, dissenting) that when, upon the death of the obligee of a money bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond.

Kandhiya Lal *v.* Chandar 313

DECLARATORY DECREE *Abstract right—Cause of action—Costs.*] A Hindu brought a suit in which he alleged that the Hindu community had acquired by long established custom an exclusive right to use for religious purposes a ghat situate on the river Ganges, but that the Muhammadans were in the habit of interfering with the exercise of such right by bathing at the ghat. He prayed for a declaration of the right, and for a perpetual injunction to be issued to the Muhammadans generally forbidding them to resort to the ghat. No act of trespass was charged against any of the defendants. The defence was that the Muhammadans were entitled to use the place, and their use of it did not cause any inconvenience to the plaintiff.

Held that the suit was not maintainable, since the Court had no power to pass a decree against persons who had never interfered with the property in dispute, or to issue an injunction against the whole Muhammadan world; but that, inasmuch as the defendants had fought the case all along as if the suit were maintainable, and upon a false issue, both sides must pay their own costs.

Shah Muhammad *v.* Kashi Das 199

2. ———————————. *Cause of action—Hindu widow—Testamentary declaration*] A sonless Hindu widow, in possession of her deceased husband's estate as such, made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that *S*, the person entitled to succeed her, had no right to the property *Held* that such statement as it was intended to operate, and would have operated, as a will in respect of the property, gave *S* a right to sue for a declaration that it should not have any effect as against him.

Kalian Singh *v.* Sanwal Singh 163

———————————. *See* Execution of decree 3. Jurisdiction 3, 8. Sale in execution of decree.

DECREE. *See* Appeal.

"DECREE." *See* Appeal, memorandum of.

DECREE, AMENDMENT OF. *See* Civil Procedure Code ss. 206, 209.

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DECREE FOR SALE OF MORTGAGED PROPERTY. *See* Execution of decree 7.

DECREE FOR SALE OF MORTGAGED PROPERTY AND FOR COSTS. *See* Execution of decree 8.

DECREE, order amending. *See* Civil Procedure Code, s. 206

DECREE payable by instalments. *See* Execution of decree 9, 10.

DECREE, uncertified adjustment of. *See* Contract.

DEFAMATION. *Justification—Express malice—Evidence of complainant having previously acted as alleged in the libel—Act XLV of* 1860 (*Penal Code*). *s.* 499] In a prosecution for defamation under s. 500 of the Penal Code, the alleged libel accused the complainant, who was a judicial officer, of (i) having, upon a particular occasion, used abusive language to certain respectable native litigants appearing before him in Court, and (ii) having, upon other occasions not specified, treated other respectable natives (not named) "in a similar manner." This latter accusation was contained in a postscript. The complaint filed by the complainant in the Court of the committing Magistrate, and the charge sheet in which the Magistrate committed the defendant for trial, covered the whole of the document complained of, except the postscript. At the trial of the case the defendant pleaded not guilty, and also relied on the first, eighth and ninth Exceptions to s 499 of the Penal Code. The prosecution gave evidence to prove that, in making the charges contained in the alleged libel, the defendant was actuated by express malice toward the complainant.

Held, with reference to the terms of s 499 of the Penal Code, that evidence of particular instances of abusive language applied by the complainant upon former occasions to natives appearing in his Court was admissible, first, as relating to the question what was the reputation which the defendant was said to have injured, and secondly because it must be gathered from the document complained of *as a whole* whether it showed a malicious intention or not.

Laidman *v.* Hearsey 906

——— ——— . *See* Act XLV of 1860, s. 499

DISQUALIFIED PROPRIETOR *See* Act XIX of 1873, ss. 194, 195.

DOWER *See* Muhammadan Law 3

ESTOPPEL *See* Act XVIII of 1873, s. 9. Pre-emption 6 and 10.

ESTOPPEL, EQUITABLE. *Extinguishment of charge.*] An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mortgagees obtained a decree upon their deed and in execution thereof the property was attached and sold, and the decree holders obtained possession. The heirs of the mortgagor sued the decree holders for recovery of possession, and for arrears of the annuity claiming under the terms of the grant.

Held that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unincumbered, he was bound to give it over to them free from incumbrance, and it would not lie in his mouth, nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees.

Radhey Lal *v.* Mahesh Prasad 864

EUROPEAN BRITISH SUBJECT NOT DOMICILED IN INDIA. *See* Majority, age of

EVIDENCE. *See* Defamation.

EVIDENCE, SECONDARY. *See* Act I of 1872, s. 63 (*c*).

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EXECUTION OF DECREE *Application by two of three joint decree-holders for part execution of joint decree—Limitation—Act XV of* 1877, *sch.* ii, *No* 179—*Acquiescence by judgment-debtor in part execution*] A decree for money was passed in 1871 in favour of two persons jointly. In 1883 the decree-holders applied for execution thereof. By previous applications for execution made in 1875, 1877, and 1880, the decree-holders had sought to recover two thirds of the amount of the decree.

Held that inasmuch as the previous executions of the decree by some sharers for their shares, whether strictly allowable or not, were allowed, and no objections at the time were taken, they were good for the purpose of keeping the decree alive, and that the judgment debtor could not now take exception to them as not being applications to enforce the decree within the meaning of the Limitation Act. *Mungul Pershad Dichit* v. *Girja Kant Lakiri* followed

Nanda Rai *v.* Raghunandan Singh 282

2. ——— ———. *Application for refund of excess payment—Accrual of right to apply—Act XV of* 1877, *sch.* ii, *No* 178.] The judgment-debtors against whom a decree had been executed applied for a refund of money which they alleged had been recovered in execution by the decree-holders in excess of what was actually due under the decree. Upon this application, an account was taken by order of the Court.

Held that the limitation applicable to the case was that provided by art. 178, sch ii of the Limitation Act, and that the right to apply for the refund of the excess amount paid in execution accrued at the time when the account was taken and stated on the application of the judgment-debtors in the course of the proceedings in execution.

Mula Raj *v.* Debi Dihal 371

3. ——— ———. *Application of transferee of decree for execution disallowed—Suit by transferee for decretal amount—Declaratory decree—Civil Procedure Code, ss* 232, 244.] The transferee of a decree for costs, associating with him the transferor, made an application under s 232 of the Civil Procedure Code to be allowed to execute the decree The application was opposed by the judgment-debtor, and was rejected, and the Court referred the transferee to a regular suit. After taking various proceedings ineffectually, he instituted a suit for the recovery of the sum to which he was entitled as costs under the decree transferred to him.

Held that the plaintiff, as the holder of the decree by assignment, could only recover the amount under it by executing the decree, and not by a separate suit; but that he was entitled to have a decree declaring that the assignment to him of the decree-holder's rights under the decree was valid, and gave him a right to execute it, and that the Court's order under s 232 which disallowed the execution was an improper one, a suit for this relief being maintainable; for, there being no appeal from orders under s 232, there would otherwise be no remedy, and that, looking at the plaint and the issues on which the parties were divided, and the fact that the Court which refused the plaintiff's application for execution, referred him to a regular suit, this relief might properly be given in the present suit.

Per MAHMOOD, J, that the suit was maintainable, inasmuch as the present plaintiff never having been accepted on the record as holder of the decree the questions which were disposed of by the Court executing the decree, as between the plaintiff and the judgment-debtor, could not be regarded as questions within s 244 of the Civil Procedure Code.

Ram Bakhsh *v.* Panna Lal 457

4. ——— ———. *Attachment of property—Judgment debtor declared an insolvent—Claim by official assignee to attached property—Appeal from order disallowing claim—Stat* 11 & 12 *Vic., c* 21, *ss.* 7, 49—*Civil Procedure Code, ss.* 244, 278—"*Repesentative*" *of judgment-debtor.*] A decree-holder, having attached the property of his judgment-debtors in

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execution of the decree, obtained an order for sale of the attached property. Prior to sale, the judgment-debtors made an application to be declared insolvents, and obtained an order under Stat. 11 and 12 Vic., c. 21, s. 7, by which their property was vested in the Official Assignee. An application was then made by the Official Assignee to the Court in which the execution of the decree was pending, for the release of the property from attachment, and that the property might be made over to him The Court dismissed the application. On appeal, the District Judge reversed the first Court's order.

Held that the matter did not come before the Court of first instance under s. 49 of Stat. 11 and 12 Vic, c. 21, inasmuch as that section refers to cases where the insolvent's schedule has been filed, and to debts or demands admitted therein, and, in the present case, no schedule had been filed at the time of the Official Assignee's application; and the Court could therefore only entertain the application under the provisions of the Civil Procedure Code relating to the execution of decrees.

Held that the Official Assignee could not be held to be a representative of the judgment-debtors within the meaning of s. 244 of the Civil Procedure Code, and his application was not one relating to the execution, discharge, or satisfaction of the decree.

Held that the Court of first instance had only jurisdiction in the matter under s. 278 of the Code, and disposed of it under that section, and that the District Judge had no jurisdiction to entertain the appeal.

Kashi Prasad *v.* Miller 752

5. EXECUTION OF DECREE. *Civil Procedure Code, s. 320—Transfer of decree to Collector for execution—Jurisdiction—Rules made by Local Government—Civil Procedure Code, s 622—High Court's powers of revision*] A decree passed by a Subordinate Judge upon a bond, in which certain immoveable property was mortgaged, was, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, transferred to the Collector for execution, A sale in execution took place, and the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree.

Held that, with reference to the second paragraph of Rule 19 of the Rules framed by the Local Government under s. 320 of the Civil Procedure Code, regarding the transmission, execution, and retransmission of decrees, and published in the *N.-W. P. and Oudh Gazette* of the 4th September, 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of s. 320, and notwithstanding the ruling of the Full Bench in *Madho Prasad* v. *Hansa Kuar*.

Held also that, inasmuch as the Subordinate Judge had jurisdiction to decide the question, and inasmuch as, even if his decison were wrong, the purchaser had a remedy by bringing a regular suit, the matter did not fall with s. 622 of the Civil Procedure Code, so as to call for the interference of the High Court in revision. *Shivanathaji* v. *Joma Kashinath* and *Amir Hasan Khan* v. *Sheo Baksh Singh* referred to.

Sundar Das *v.* Mansa Ram 407

6. ——————————. *Contract superseding decree—Adjustment of decree—Certification—Civil Procedure Code, s 258—Limitation—Acknowledgment in writing—Act XV of 1877 s. 19*] In the course of proceedings in execution of a decree dated the 14th June, 1878, the parties, on the 11th January, 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. The deed recited that the decree was under execution, and that a mort-

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gage bond dated the 1st December, 1873, in favour of the judgment-debtor by a third party, had been attached and advertized for sale, and that the decree-holder and judgment debtor had arranged the following method of satisfying the decree: that the judgment-debtor should make over the said bond to the decree-holder, in order that he might bring a suit thereon at his own expense against the obligor, and realize the amount secured by the bond, and out of the amount realized satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against the obligor, and together with a sum due by the judgment-debtor to the decree-holder under a note of hand for Rs 250 with interest; and other details which need not be stated On the same day that deed was executed, the decree-holder filed a petition in the Court, to the effect, that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the bond advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution with interest and costs; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and the previous attachment maintained, and stating that, after realization of the amount entered in the bond advertized for sale, an application for execution would be duly filed. On this the order was that the execution case be struck off the file and the attachment maintained On the 24th December, 1883, the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January, 1881, and that the application was barred by limitation, the previous application being dated the 9th November, 1880

Held that the application was within time, inasmuch as the acknowledgment in the deed of the 11th January, 1881, came within the terms of s. 19 of the Limitation Act, so as to originate a fresh period of limitation in respect of the execution of the decree. *Ghansham* v *Mukha*, *Janki Prasad* v *Ghulam Ali* and *Ramhit Rai* v. *Satgur Rai* followed

Per OLDFIELD, J —That the agreement of the 11th January, 1881, did not contemplate, and had not the effect of cancelling the decree and substituting for it a new contract, inasmuch as the deed contained nothing to the effect that the decree was superseded; and all it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. Further, if the arrangement was to be regarded as within the meaning of an adjustment of the decree under s 258 of the Civil Procedure Code, it could only be recognized by the Court when certified by the decree holder or judgment-debtor: and in this case the only certification which was made was by the decree-holder, by his petition of the 11th January, 1881, which was in respect of a temporary arrangement under which the decree remained in force

Per MAHMOOD, J.—That the agreement of the 11th January, 1881, was intended by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract, but that the deed could not be regarded as such an adjustment of the decree as satisfied the requirements of s 258 of the Civil Procedure Code because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist; and that therefore the certification of the adjustment was inadequate and could not be recognized in executing the decree

Fateh Muhammad *v* Gopal Das 424

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7. EXECUTION OF DECREE. *Decree for sale of mortgaged property—Application for execution before time allowed for payment—Act IV of 1882, ss. 86, 88*] An application for execution of a decree for sale of mortgaged property passed under s. 88 of Act IV of 1882 (Transfer of Property Act), and which directed that if the decree were not satisfied within two months the property should be sold, ought not to be allowed before the expiration of the period therein provided

Har Dayal *v.* Chadami Lal 194

8. ——— ——— ——— ———. *Decree for sale of mortgaged property and for costs—Attachment and sale of other property for whole amount of decree—Suit to set aside execution sale—Civil Procedure Code, ss. 311, 312—Finality of order in execution proceedings.*] In execution of a decree on a mortgaged-bond, for the sale of the mortgaged property, and for the costs of the suit, amounting to Rs. 1,000, certain houses were attached on the 30th September, 1881, which were not part of the mortgaged property. On an objection raised by the judgment-debtors that the decree was by its terms executable only against the mortgaged property, the High Court in appeal decided, on the 6th September, 1882, the houses were not liable to attachment and sale under the decree. In the meantime, on the 15th June, 1882, the houses had been put up for sale and purchased for Rs. 500, and the sale had been confirmed on the 16th August, 1882. The judgment-debtors brought a suit against the purchaser to set aside the sale, on the ground that the houses were not saleable under the decree.

Held that the decree, in regard to costs was a decree made personal against the judgment-debtor, and conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against property mortgaged in the bond, but also against the person and other property of the judgment-debtor.

Per OLDFIELD, J. (MAHMOOD, J., doubting) that the attachment and sale in execution of the decree were valid, inasmuch as they were made in respect of the costs as well of the principal and interest decreed.

Per MAHMOOD, J., that the suit was maintainable, and was not barred by any plea *in limine*. *Abdul Haye* v. *Nawab Raj* referred to.

Also *per* MAHMOOD, J., that inasmuch as the adjudication of the 6th September, 1882, was one between the judgment-debtors on the one hand and the decree-holder on the other, and subsequent not only to the sale, but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide anything in relation to the nature of the decree as to costs, the order then passed could not be used against the purchaser.

Also *per* MAHMOOD, J., that it was doubtful whether the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself, were valid; but that everything that was said against these proceedings constituted matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale; and that therefore, even assuming that the sale and confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale, within the meaning of s. 311, a suit like the present, upon that ground alone, was prohibited by the last part of s. 312.

Raghubar Dayal *v.* Ilahi Bakhsh 450

9. ——— ——— ——— ———. *Decree payable by instalments—Civil Procedure Code, s 230—Finality of order made in execution-proceedings.*] In 1868 a decree was obtained for Rs. 1,100, which provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments should be Rs. 100 at the end of each subsequent

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year, and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent per mensem. In 1877, the decree-holder applied for execution of the decree, asserting that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200, and four of Rs 100, each, and that default had been made in payment of the fifth instalment of Rs 100, and he asked to recover the whole amount due on the decree. No order was passed on this application, and eventually the case was struck off In 1880, the decree-holder again applied for execution of the decree, upon the same grounds as those upon which the previous application was based. Notice was issued and served, and a warrant issued for the arrest of the judgment-debtor, but eventually the case was struck off. In 1883, the decree holder on the same grounds made another application for execution. It was contended by the judgment-debtor that execution was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and even if they had been paid, they could not be recognized, not having been certified.

Held that the proper time from which to reckon the limitation of twelve years was the fifth year from the date of the bond, the whole claim from the beginning and the order passed in 1880 having gone upon that basis, that the Court could not go behind that order, and that consequently the decree-holder was within time, and might take out execution.

Kanji Mal *v.* Kanhia Lal 373

10 EXECUTION OF DECREE. *Decree payable by instalments—Execution of whole decree—Construction of decree—Payments out of Court—Act XV of 1877, sch. ii, No 179 (6)—Civil Procedure Code, s 258.*] A decree passed against the defendant in a suit, dated the 13th March, 1877, directed "that the plaintiff should recover the decree-money by instalments agreeably to the terms of the deed of compromise, and he, in case of default, should recover in a lump sum." The compromise mentioned in the decree provided that the amount in dispute should be paid in ten instalments, from 1284 to 1294 fasli, the first to be paid on the 27th May, 1877 (1284 fasli) and the remaining nine instalments on Jaith Puranmashi of each succeeding fasli year. On the 1st September, 1883, the decree-holders applied for execution of the decree, alleging that the first four instalments had been paid, but not any of the succeeding instalments, and they claimed to recover, under the terms of the decree, the fifth and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that, even if the first four instalments had been paid, such payments could not be recognised by the Court as they had not been certified.

Held, reversing the decision of the lower appellate Court, that if the four annual instalments had not been paid under the decree, the execution of the decree was barred by limitation.

Held, also, that recognition of such instalment was not barred by the terms of s 258 of the Civil Procedure Code. *Sham Lal* v. *Kanahia Lal* and *Fakir Chand Bose* v. *Madan Mohan Ghose* followed

Zahur Khan *v.* Bakhtawar 327

11. ——————. *Finality of order made in execution proceedings construing decree*] In reference to an application for execution of a decree, a Court made an order between the parties construing the decree to award interest at a certain rate till payment.

Held that no contrary construction could be placed upon the decree in a subsequent application in the execution-proceedings.

Ram Kirpal v *Rup Kuari* referred to and followed.

Beni Ram *v.* Nanhu Mal 102

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12 EXECUTION OF DECREE. *Imperfect attachment of immoveable property—Private alienation after such attachment not void—Civil Procedure Code, ss. 274, 276, 295, sch. IV., No. 141.*] A judgment-debtor whose property had been attached in execution of a money decree, sold the property, and out of the price paid into court the amount of the decree, and prayed that the attachment might be removed. While the attachment was subsisting, and prior to the sale, the holders of other money-decrees against the same judgment debtor preferred applications, purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditors The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bonâ fide* transaction, entered into for valuable consideration.

Held that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in manner provided by s. 274 of the Civil Procedure Code, their claims were not entitled to the protection conferred by s. 276 against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that the sale by the judgment-debtor was valid; and that execution of the decrees could not take place.

Per MAHMOOD, J.—That s. 276 of the Civil Procedure Code, being a restriction of private rights of alienation should be strictly construed; that before property can be subjected to such restriction, there must be a perfected attachment; that the orders passed under s. 295 did not amount to such attachment; and that, even assuming them to amount to such attachment, they, not having been duly intimated and notified, could not make the prohibition of s 276 applicable to the case *Mahadeo Dubey* v. *Bhola Nath Dichit*, *Anand Lall Dass* v. *Jubodhur Shaw*, *Rameswar Singh* v. *Ramtanu Ghose*, *Indro Chunder Baboo* v. *Dunlop*, *Gobind Singh* v. *Zalim Singh* and *Gumani* v. *Hardwar Pandey* referred to.

Also *per* MAHMOOD, J.—While s. 295 of the Code gives a special right to judgment-creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, and that its result should appear in assets realized by the sale, and therefore, until the sale takes place, no such right can be enforced. *Bishen Chunder Surma Chowdhry* v. *Mun Mohinee Dabee* referred to.

Ganga Din *v.* Khushali 702

13. ——— ——— ———. *Joint ancestral property—Execution against deceased son's interest in hands of the father—Death of judgment-debtor after attachment and before sale—Civil Procedure Code, s. 274—Copy of order for attachment not fixed up in Collector's office*] In execution of a money-decree, an order was issued under s. 274 of the Civil Procedure Code, for the attachment of property which was the joint ancestral estate of the judgment-debtor and his father. A copy of this order was not fixed up in the office of the Collector of the district in which the land was situate, as required by s. 274. The sale was ordered and a day fixed for sale but in consequence of postponements made at the judgment-debtor's request, no sale took place. In the meantime the judgment-debtor died, and the decree-holder applied for execution against the father as representative of the judgment-debtor, whose interest had survived to him.

Held that the decree-holder had, by the proceedings taken in execution during the son's lifetime, obtained rights over his interest which could not be defeated by his death before sale. *Suraj Bansi Koer* v *Sheo Persad Singh* followed.

Held also that, though the defect in the manner in which the attachment was made might render the attachment ineffectual for the purpose of voiding alienations made, the attachment was effectual

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against the judgment-debtor, and the defect did not afford a ground for declaring the execution proceedings ineffectual.
Rai Balkishen *v.* Rai Sita Ram 731

14. EXECUTION OF DECREE. *Material irregularity in publishing or conducting sale in execution—Objection that property sold was not legally saleable—Civil Procedure Code, ss.* 244, 311, 312.] An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of sale was not legally saleable, is not a matter which can be entertained by the Court under s 311 of the Civil Procedure Code, so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it. *Ram Gopal* v. *Khiali Ram* and *Janki Singh* v. *Ablakh Singh* distinguished.

Per MAHMOOD, J.—The scope of s. 244 of the Civil Procedure Code is limited to matters connected with the execution of the decree between the decree-holder and the judgment-debtor, and covers all the questions which may arise between the decree-holder and the judgment-debtor relating to the execution, &c., of the decree. Questions that may arise after the sale are not, strictly speaking, questions relating to the execution, discharge or satisfaction of the decree, within the meaning of cl. (3), s. 244; but as soon as there has been a sale, the execution of the decree, so far as the decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree.

Also *per* MAHMOOD, J.—The expression "conducting the sale" as used in s. 311 of the Civil Procedure Code, does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale, and not to anything done antecedent to the order of sale. *Olpherts* v. *Mahabir Pershad* referred to.
Ramchhaibar Misr *v.* Bechu Bhagat 641

15. ——————— — — ———. *Order for sale—Application for execution struck off—Application for restoration—Finality of order.*] A decree for money was passed on the 19th March, 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December, 1878. On this application an order was made by the Court executing the decree (Munsif) for the sale of certain property belonging to the judgment-debtor. The latter objected to the execution of the decree, on the ground of limitation, and the decree-holders filed an answer to the objection. On the 14th July, 1879, the case was struck off because the decree-holder had not deposited certain process-fess, without the disposal of the objection. On the 1st October, 1879, the decree-holders again applied for the sale of the property, and it was ordered to be sold. On the 17th February, the judgment-debtor presented a petition repeating the objection, which, on the 13th March, 1880, the Munsif entertained and disallowed. This order was affirmed in appeal by the District Judge, and again by the High Court. Meanwhile, the Munsif had struck off the case from the file of execution cases pending in his Court, on the ground that the records had been despatched to the appellate Court. On the 18th September, 1882, the decree-holder again applied for execution of the decree, paying that "the suit might be restored to its number, and that the judgment-debt might be caused to be realized by attachment and sale of the judgment-debtor's property specified in the former schedule."

Held that the decree-holder was entitled to execution of the decree, and that he could get it under the application which was made on the 1st October, 1879, inasmuch as the matter was made *res judicata* by the decree of the High Court in appeal, and it must be taken that that decree was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place.

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Held also that the proper application for the decree-holder to have made in September, 1882, was that the case might be restored to the Munsif, and that the present application might be so dealt with as to effect the same result, because the prayer contained therein referred to the number of the proceedings of October, 1879, and to the schedule of the property then ordered to be sold.

Jawahir Singh *v.* Jadu Nath 439

16. EXECUTION OF DECREE. *Powers of Court executing transmitted decree—Civil Procedure Code, ss* 228, 239] The powers which the foreign Court has, under s. 228 of the Civil Procedure Code, are confined to the execution of the decree, and the Court cannot question the propriety or correctness of the order directing execution, nor can it, with reference to s. 239 of the Code, stay execution except temporarily.

Held, therefore, where the drawers of a hundi, against whom the indorsee from the payee had obtained a decree on the hundi, objected in the Court to which the decree had been transmitted for execution that execution should not be allowed, because the payee had paid the amount of the hundi to the decree-holder, after the decree had been passed, and such Court refused to entertain the objection, that the order of the lower appellate Court directing that the parties should be allowed to produce evidence in regard to the alleged payment, and that, should the Court of first instance find that the decree-holder had received satisfaction to the full amount of the decree, the judgment-debtors should be absolved from all liability under the decree, could not be maintained.

Ram Lal *v.* Radhey Lal 330

17. ——— ———. *Sale—Property sold before advertized time —Sale invalid.*]—A sale by public auction in execution of a decree, which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the Civil Procedure Code.

The time to be notified for a sale by public auction in execution of a decree must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, and that all who are interested in the property sold may see that there is a fair competition and a good sale.

Where property which was advertised for sale by public auction in execution of a decree at 11 A. M., was sold at 7 A. M.,—*held* that the mistake was more than a mere irregularity in conducting the sale, and that the whole of the proceedings were invalid.

Chedami Lal *v* Amir Beg 676

18. ——— ———. *Sale of immovedble property in execution before thirty days from date of fixing up proclamation—Material irregularity in publishing or conducting sale—Civil Procedure Code, ss.* 290 311]. An infringement of the rule contained in section 290 of the Civil Procedure Code, is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which section 311 refers.

Bakhshi Nand Kishore *v.* Malak Chand 289

19. ——— ———. *Sale in execution—Confirmation of sale—Objection that property is not liable to attachment—Civil Procedure Code, ss.* 278, 311, 312] *Held* that an objection made by one whose property was attached and sold in execution of a decree for the payment of money for the performance of which he had become a surety, that he was no party to the decree, and his property was not liable to be attached and sold, and therefore the sale was invalid, was not an objection entertainable under s. 311 of the Civil Procedure Code, and was consequently no ground for setting aside the sale under that section, especially as it was preferred for the first time in appeal,

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and, moreover, might have been taken under s. 278 at the time of attachment, when the objector would have had his remedy as therein provided.

Hub Lal *v.* Kanhia Lal 365

20. EXECUTION OF DECREE. *The decree to be executed where there has been an appeal*] The effect of the decision of the Full Bench in *Shohrat Singh* v *Bridgma* is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred to, and the mandatory part of it so affirmed should be executed as though it were the decree of the appellate Court.

Kristo Kinkur Roy v. *Rajah Burrodacount Roy* referred to.

Where the first Court of appeal affirmed the decree of the Court of first instance, and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal, and the decree-holder made an application of which the object clearly was to have execution taken under the decree of the appellate Court, by carrying out the mandatory part of the decree of the Court of first instance, *held* that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of last instance was under the circumstances a mere technical objection, and there was no reason why the execution asked for should not be allowed.

Gobardhan Das *v.* Gopal Ram 366

———————————. *See* Act XV of 1877, sch ii, No. 179, and No. 179 (4). Alluvion. Civil Procedure Code, s. 244: s. 244 (*c*), ss. 311, 312. Pre-emption 2.

EX-PARTE DECREE—"*Appearance*" *of defendant under Civil Procedure Code s* 101—*Civil Procedure Code, ss.* 64, 100, 108, 157] The first hearing of a suit was fixed for the 12th December, 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not then appear, a decree was passed in favour of the plaintiff. A *vakalat-nama* had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment.

Held that these acts on the defendant's part did not constitute an "appearance" by him within the meaning of s. 100 of the Civil Procedure Code, which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under s. 64; that the decree was therefore *ex-parte* within the meaning of ss. 100 and 108, and an appeal consequently lay to the High Court under s. 588, clause (9), from an order rejecting an application to set the decree aside *Zain ul abdin Khan* v. *Ahmad Raza Khan* distinguished. *The Administrator General of Bengal* v. *Dyaram Das, Bhimacharya* v. *Fakiroppa* and *Bibee Haloo* v *Atwaro* referred to.

Per MAHMOOD, J.—That the Court on the 18th December, seemed to have acted under s. 157 of the Civil Procedure Code, and, choosing the first of the alternative courses allowed by that section, acted under Chapter VII of the Code, and passed an *ex-parte* decree under the provisions of s. 100 of that Chapter.

Hira Dai *v.* Hira Lal 538

———————————. *See* Civil Procedure Code s. 136.

EX PROPRIETARY TENANT. *See* Act XII of 1881, s. 7: ss. 7, 9. Landholder and tenant 1.

FALSE EVIDENCE. *See* Act XLV of 1860, s. 193.

GRIEVOUS HURT. *See* Magistrate, powers of.

HEIRS, right of one of several, to sue creditor for share of debt. *See* Debt.

HIGH COURT, REFERENCE TO. *See* Civil Procedure Code, s. 617.

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HIGH COURT'S POWERS OF REVISION. *Civil Procedure Code, ss. 2, 622—Act XL of 1858 (Bengal Minors Act), s 3—Certificate of administration.*] Under s. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Act, to defend a suit on the minor's behalf, as guardian of such minor.

Where a Subordinate Judge had so acted,—*held* that the High Court had no power to revise his order under s. 622 of the Civil Procedure Code.

Baldeo Das *v.* Gobind Shankar 914

2. ——— ——— ———. *Civil Procedure Code, s. 206—Order amending decree*] A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say he accepted the appeal, and that the decree as it stood failed to give effect to the judgment.

Held by the Full Bench that an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable, under s. 588. Also that, in saying that by "dismiss," his predecessor had meant "decree," the Judge had altered the decree in a manner not warranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s 622 of the Code, and that the High Court was consequently competent to reverse his order.

The judgment of OLDFIELD, J., reversed, and that of MAHMOOD, J, affirmed.

Surta *v.* Ganga 875

3. ——— ——— ———. *Civil Procedure Code, ss. 206, 622—Order amending decree in respect of court-fee in pre-emption suit*] An order as to costs, contained in a decree for pre-emption, directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. Subsequently the Court, professing to act under s. 206 of the Civil Procedure Code, passed an order directing the amendment of the decree by calculating the pleader's fees upon the actual value of the property.

Held by the Full Bench that the alteration of the decree was improper, and was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code.

An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and such an order is not appealable under s. 588 of the Code Such an order, therefore, can be revised by the High Court, under s 622.

The judgment of OLDFIELD, J, reversed, and that of MAHMOOD, J, affirmed.

Raghunath Das *v.* Raj Kumar 876

4. ——— ——— ———. *Civil Procedure Code, s. 622—Transfer of interest pending suit—*Lis pendens*—Application to bring transferee upon the record—Civil Procedure Code, s 244.*] A decree of the High Court, giving possession of certain shares in a bank to the plaintiff *R*, was reversed on appeal by the Privy Council. The defendant then applied to the Court of first instance to order restitution of the shares, which had been realized by the plaintiff. Upon being ordered to produce the shares *R* made an application to the Court, professedly under s. 244 of the Civil Procedure Code, in which he alleged that, pending the appeal to the Privy Council, he had transferred the shares to *G*, his counsel in the case, who had failed to restore them, and he prayed "that the said person might be brought upon the record, and that execution for recovery of the

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said shares might be given against him." The Court passed an order upon this application, calling on *G* to show cause why he should not be called upon to restore the shares made over to him by *R*, and he thereupon filed an answer denying that he was the custodian of the shares, and alleging that he was their purchaser for value. The Court passed an order directing that *G's* name should be placed on the record, so that the decree might be executed against him.

Held that the question being one between two judgment-debtors *inter se*, and not between the parties arrayed against each other as decree-holders of the one part, and judgment debtors or their representatives of the other, the provisions of s. 244 of the Civil Procedure Code were not applicable to the case; that *G* could not be regarded as "representative" of *R* within the meaning of that section; that the application by *R* was meant to be and actually was one praying that, in respect of the scrip, restitution of which was being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such interest had passed from him, be brought under the operation of the execution proceeding; that this was an application under s 372 of the Civil Procedure Code; and the order passed on it, being appealable under s. 588 (21), was not open to revision by the High Court under s. 622.

Raynor *v.* The Mussoorie Bank, Limited 681

HIGH COURT'S POWER'S OF REVISION. *See* Appeal, memorandum of. Civil Procedure Code, s. 206 : s. 407 (*c*) : s. 622.

HINDU LAW. *Impartible raj—Succession in joint family to ancestral impartible estate—Right of nearest male collateral—Exclusion of widow where the family is joint, and the estate not separate.*] Impartible ancestral estate is not, merely by reason of its being impartible, the separate estate of the single member of the undivided family, upon whom it devolves, so long as the family continues joint.

Chintaman Singh v. *Nowlukho Konwari* referred to and followed.

A female cannot inherit impartible ancestral estate, belonging to a joint family, under the Mitakshara, when there are any male members of the family who are qualified to succeed as heirs; a rule of law not dependent on custom; and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them.

Maharani Hiranath Koer v. *Ram Narayan Singh* approved.

Where raj estate, ancestral and impartible, was not separate property and the family was undivided, and where no special custom existed, modifying the Mitakshara law of succession, *held* that the nearest male collateral relation of the last Raja, who died without male issue, was entitled to succeed in preference to the Raja's widow.

This relation, *viz*, a brother of the late Raja's deceased father, at one time received an allowance for maintenance out of the family estate. What amounted to an attachment of this, according to a subsequent judicial decision, occurred in 1857. *Held* that he had not thereby been deprived of his right of succeeding as a member of the joint family.

The raj estate in question originated in the partition of a more ancient one, with others out of which minor estates were formed. If in the latter there had been descents to widows, no inference hence, to support the widow's claim to inherit in this family, could be drawn. Such minor estates might have been separate (which estates granted for maintenance probably would be), and in that case the widows of the last holders would have succeeded them in due course of law. Unless connection is shown between families,

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evidence of a special family custom in one is not evidence of a similar family custom in another.

Raja Rup Singh *v.* Rani Baisni 1

HINDU LAW. *Mitakshara—Hindu widow—Estate inherited by two Hindu widows from deceased husband—Alienation by one widow.* When their Lordships of the Privy Council have seen fit to place a definite construction upon any point of Hindu law, the High Court is bound by such construction until such time as their Lordships may think fit to vary the same.

According to the Mitakshara law, the estate which two Hindu widows take by inheritance from their deceased husband is not several, but joint The senior of two such Hindu widows is not a manager of such estate, and competent, for purposes of legal necessity, to alienate it without the consent of the other. *Bhugwandeen Doobey* v *Myna Baee* and *Gajapathi Nilamani* v. *Gajapathi Radhamini* referred to

Ram Piyari *v.* Mulchand 114

———— ————. *See* Debt.

HINDU WIDOW. *See* Declaratory decree 2. Hindu Law. 1, 2. Pre-emption, 4.

HURT. *See* Criminal Procedure Code, s 35. Magistrate, powers of

IMPARTIBLE RAJ. *See* Hindu Law, 1.

INHERITANCE. *See* Condition restraining alienation. Debt. Muhammadan Law, 1, 2

INSOLVENT. *See* Statute 11 and 12 Vic., c. 21, s. 24.

INSOLVENT JUDGMENT-DEBTOR. *See* Civil Procedure Code, s. 351 (*a*) s 351 (*b*):

INSTALMENT BOND. *See* Limitation.

INTEREST *See* Bond. Civil Procedure Code, s. 583.

JOINT ANCESTRAL PROPERTY. *See* Execution of decree 13.

JOINT HINDU FAMILY. *See* Pre-emption, 16.

JUDGMENT. *See* Appeal.

JUDICIAL NOTICE. *See* Act XLV of 1860, s. 296.

JURISDICTION. *Assignment of rent of land—Suit by assignee against tenant—Civil and Revenue Courts—Act XII of* 1881, *s.* 93 (*d*).] A suit by the person, to whom a landholder has assigned rents payable to him by tenants, for the recovery of the money so assigned, is a suit cognizable in the Civil Courts and not in the Revenue.

Ganga Prasad *v.* Chandrawati 256

2. ———— ————. *Civil and Revenue Courts—Declaration that land is plaintiff's sir and defendant a lessee—Landholder and tenant*] A zamindar claimed a declaration that certain land was his *sir* and that the defendants were in possession thereof as his lessees. The defendants resisted the claim on the ground that they were tenants of the land at fixed rates, and not lessees of it as the plaintiff's *sir*.

Held that the suit raised the question whether the land was *sir*, in respect of which no occupancy-rights could be created except by contract, and whether the defendants were the plaintiff's lessees, and that this was a question purely of contract, and one which was cognizable in the Civil Courts.

Kauleshar Panday *v.* Girdhari Singh 338

3. ———— ————. *Civil and Revenue Courts—Landholder and tenant—Declaratory decree—Act XII of* 1881, *s.* 95 (*n*)] A suit in which the plaintiff claims, as the tenant of land, that he may be declared to be the tenant, and that the defendant, the landholder, may be restrained from interfering with his right to the land as a tenant, and in which the defendant denies the relation between him and the plaintiff of landholder and tenant, is not a suit which is exclusively cognizable in the Revenue Court.

Sheodisht Narain Singh *v.* Rameshar Dial 188

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4. JURISDICTION. *Civil and Revenue Courts—Resumption of rent free grant—Act XII of* 1881, *ss* 30, 95 (*c*)—*Act XIX of* 1873, s 241 (*h*)] A zamindar brought a suit to recover possession of certain land in the village which was held by the defendants rent free, in consideration of rendering services as *khera patis*, on the ground that he was entitled, as zamindar, to dispense with their services, and that, therefore they no longer possessed any right to hold the land. The claim was resisted by the *khera-patis* on the ground that for many years they had been in possession of the land as muafi-holders.

Held that the dispute so raised was a matter which could form the subject of an application to resume a rent-free grant within the meaning of s 30 of the N.-W. P Rent Act (XII of 1881), and that the cognizance of the suit by the Civil Court was therefore barred by cl. (*c*) of s 95 of that Act, and that, for similar reasons, the Civil Court, under cl. (*h*) of s. 241 of the N.-W P Land-Revenue Act (XIX of 1873), could not exercise jurisdiction over the matter of the suit.

Tika Ram *v.* Khuda Yar Khan 191

5. ———————. *Competency of Subordinate Judge to try Munsif's case—Act XVI of* 1868, *ss* 13, 15, 16—*Act VI of* 1871, *ss.* 19, 20—*Civil Procedure Code, ss* 15, 25 57 (*a*), 578.] *Per* PETHERAM, C. J., and BRODHURST, MAHMOOD, and DUTHOIT, JJ —The object of ss. 19 and 20 of the Bengal Civil Courts Act 1871, was to create in the District Judge, Subordinate Judge, and Munsif concurrent jurisdiction up to Rs. 1,000.

Per PETHERAM, C. J —S. 15 of the Civil Procedure Code is a proviso to those sections. The word "shall" in that section is imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. Whenever an Act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it

Per DUTHOIT, J.—The words in s. 57 of the Civil Procedure Code "shall be" are an instruction which the Court is bound to follow; and they are therefore a restraint upon jurisdiction The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal.

BRODHURST and MAHMOOD, JJ.—S. 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of higher grades.

Russick Chunder Mohunt v. *Ram Lal Shaha* and *Sufee-ool-lah Sircar* v. *Begum Bibi* followed.

Per OLDFIELD, J —S. 15 of the Civil Procedure Code is a provision entirely of procedure as distinct from jurisdiction, and its effect on s. 19 of the Bengal Civil Courts Act is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise to a certain procedure, namely, that the suits be instituted in the Court of lowest grade competent to try them.

Held, therefore, by PETHERAM, C. J., and OLDFIELD, BRODHURST, and MAHMOOD, JJ., where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction.

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The plaint in such suit had been in the first instance presented to the Munsif who had returned it, to be presented to the Subordinate Judge.

Per DUTEOIT, J.—The decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for the jurisdiction was there though it ought not to have been exercised. This view of the matter was consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction.

Per MAHMOOD, J.—The institution of a suit in a Court of higher grade than the Court which is competent to try it is not a question either as to the jurisdiction or affecting the merits of the case. It is a question of the kind provided for by s 578 of the Civil Procedure Code, and the irregularity is not one which affects "the merits of the case or the jurisdiction of the Court" within the meaning of the section.

The plea of want of jurisdiction can be entertained for the first time at any stage of a suit, provided there is on the record sufficient material to substantiate it.

Nidhi Lal *v.* Mazhar Husain 230

6. JURISDICTION. *Jurisdiction of Civil Court—Act XII of* 1881, *ss.* 10, 95 (*a*)—*Suit by landlord to determine nature of tenant's tenure*] The cognizance of the Civil Courts of a suit by a landholder for a declaration that a tenant is not a tenant at fixed rates, or an occupancy-tenant, but a tenant-at-will, is barred by the provisions of s. 95 (*a*) of the N. W P. Rent Act, 1881.

The Maharaja of Benares *v.* Angan 112

7. ——————— *Jurisdiction of Civil Court—Landholder and tenant —Suit for recovery of land of which tenant has been dispossessed—Relation of landlord and tenant admitted —Act XII of* 1881, *s.* 95 (*n*).] A landholder served a notice of ejectment on *G*, under the provisions of s. 36 of the Rent Act (N.-W. P), as a tenant-at-will. Under the provisions of s. 39 of the Act *G* contested his liability to be ejected, on the ground that he was not a tenant-at-will, but one holding by virtue of an agreement executed in his favour by the landholder. The question of *G's* liability to be ejected was decided adversely to him, and he was ejected under s 40 of the Act. He subsequently sued the landholder in the Civil Court for possession of the land, by virtue of the agreement, alleging that his ejectment was a breach of such agreement. The landholder's defence to this suit was that *G* had been rightfully ejected *Held* that inasmuch as the relation of landlord and tenant between the parties at the time of the proceedings under the Rent Act was admitted, and the dispute in the suit could appropriately form the subject of an application under cl. (*n*) of s. 95 of that Act, the suit was not cognizable in the Civil Courts.

Muhammad Abu Jafar v. *Wali Muhammad, Sukhdaik Misr* v. *Karim Chaudhri, Kanahia* v. *Ram Kishen*, distinguished. *Shimbhu Narain Singh* v. *Bachcha* referred to.

Ganga Ram *v.* Beni Ram 148

8. ——————. *Liability of land to assessment of revenue—Jurisdiction of Civil Court—Declaratory decree—Act XIX of* 1873, *s.* 241.] The Civil Courts are not debarred by s 241 of Act XIX of 1873 (N.-W.P. Land Revenue Act) from taking cognizance of a suit for a declaration that land, which the revenue officers seek, under the provisions of that Act, to assess to revenue, is included in an area which has already been permanently settled, and is therefore not liable to further assessment.

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A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue free.

The Government v. *Rajah Raj Kishen Singh, Collector of Futehpur* v. *Munglee Pershad, Rajah Raghunath Suhaee* v. *Bishen Singh, Zoolfikar Ali* v. *Ghunsam Baree,* and *Sri Uppu Lakshmi Bhayamma Garu* v. *Purvis* referred to.

The Secretary of State for India in Council *v.* Ram Ugrah Singh 140

9. JURISDICTION. *Partition of Mahal—Civil Courts—Act XIX of* 1873, *s.* 241 (*f*).] *B*, the recorded proprietor of a 7 biswas 10 biswansis share in a village the recorded area of which was 476 bighas and 5 biswas, purchased a 16 biswansis and 13½ kachwansis share in the same village. In 1872, at the time of settlement, *B* was recorded as the proprietor of an 8 biswas 6 biswansis and 13½ kachwansis share, and the area of this was recorded as 476 bighas and 5 biswas, that is to say, the same area as was recorded before the purchase. In 1876, *H* purchased *B's* rights and interests in the village and in 1877 applied for partition of the share of which he had been recorded proprietor, and the same was partitioned, an area of 476 bighas and 5 biswas being allotted to him. Subsequently he brought a suit against the proprietors of the other estates into which the village had been divided for 61 bighas 4 biswas and 8 biswansis of land, alleging that, at the settlement of 1872, the area of *B's* rights and interests had been erroneously recorded as only 476 bighas and 5 biswas.

Held that the suit would not lie in the Civil Court, being barred by the provisions of s. 241 (*f*) of the N.-W. P. Land Revenue Act (XIX of 1873).

Habibullah *v.* Kunji Mal 447

10. ——————. *Suit for dissolution of partnership—Winding-up—Act IX of* 1872, *s.* 265—*Civil Procedure Code, ss.* 11, 213, 215, *sch.* IV., *Form No.* 113.] The ordinary Civil Courts have jurisdiction to try a suit for dissolution of a partnership, their jurisdiction to try such suits not being ousted by s. 265 of the Contract Act. 1872.

Ramjiwan Mal *v.* Chand Mal 227

——————. See Execution of decree, 5.

LANDHOLDER AND TENANT. *Ex-proprietary tenant—Relinquishment of ex proprietary rights—Act XII of* 1881 (*N.-W. P. Rent Act*), *ss.* 9, 31.] *Held* by the Full Bench that an ex-proprietary tenant is not competent to relinquish his holding to his landlord by private arrangement.

Per PETHERAM, C. J.—S. 31 of the N. W. P Rent Act (XII of 1881) was enacted absolutely in the interests of the cultivator, and provides in effect, that although the occupancy-tenant may not be turned out, and may not transfer his rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that, in that case, he is not liable for rent; but this provision must not be taken advantage of by letting the zamindar buy the holding, and thus introducing a new cultivator, contrary to the prohibition contained in s. 9.

Indar Sen *v.* Naubat Singh 847

2. ——————. *Mortgage by conditional sale of occupancy-rights to zamindar—Act XVIII of* 1873 (*N.-W. P. Rent Act*), *s* 9—*Act XII of* 1881 (*N.-W. P Rent Act*), *ss* 2, 9.] The occupancy-tenant of certain land, before the N.-W. P Rent Act (XII of 1881) came into force, mortgaged his rights to his zamindars by a deed of conditional sale. The zamindars sued the heirs of the conditional vendee for foreclosure and possession of the mortgaged property

Held by the Full Bench that the terms of the judgment of the Full Bench in *Naik Ram Singh* v *Murli Dhar* were directly applicable to the case, and that the transaction of mortgage, which was subsequently to become a sale, was not a transaction to which s. 2 of the Rent Act applied, because the sale would not have effect till after the Act came into operation.

Murli Rai *v.* Ledri 851

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3. LANDHOLDER AND TENANT. *Notice to quit—Act IV of* 1882 (*Transfer of Prop rty Act*), *ss.* 106, 111.] On the 11th December, 1882, *A*, who had on the 1st July, 1882, let rooms in a dwelling-house to *B*, sent a letter to the tenant in the following terms:—"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment as well as for recovery of rent due at the enhanced rate." On the 1st February, 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter.

Held by OLDFIELD, J (MAHMOOD, J., dissenting), that with reference to the terms of s 106 of the Transfer of Property Act, the letter was not such a notice to quit as the law required, inasmuch as the notice did not expire with the end of a month of the tenancy, and that this defect was not cured by the circumstance that the lessor waited until the end of the month to enforce his right to eject by suit.

Held by MAHMOOD, J. (OLDFIELD, J, dissenting) that the letter dated the 11th December, 1882, was a valid notice to quit under ss. 106 and 111 of the Transfer of Property Act and sufficient to determine the tenancy, inasmuch as it gave the tenant more than fifteen days' notice, and its terms were such that he could with perfect safety have acted upon it by quitting the premises at the proper time—namely by the end of the month, which he must be presumed to have known was the right time to leave without any risk of incurring liability to payment of further rent, the landlord having clearly indicated his intention to terminate the tenancy and the notice being binding upon him; that the additional time given by the notice must be taken to have been given for the convenience of the tenanat and not with the object of continuing the tenancy; and that the suit for ejectment, not having been brought till long afterwards, was maintainable. *Doe* v. *Smith*, *Ahearn* v *Bellman*, *Nocoordass Mullick* v. *Jewraj Baboo*, and *Jagut Chunder Roy* v. *Rup Chand Changa* referred to.

Also *per* MAHMOOD, J —The words "fifteen days" in s. 106 of the Transfer of Property Act imply a fixation of the shortest period of notice allowed by the section; and the term "expiring" means that the terms of the notice must be such as to make it capable of expiring according to law at the right time, so as to render it *safe* for the tenant to quit co-incidentally with the end of a month of the tenancy, without incurring any liability to payment of rent for any subsequent period.

Bradley *v.* Atkinson 596

4. ——————→. *Notice to quit—Act IV of* 1882 (*Transfer of Property Act*), *s.* 106] On the 11th December, 1882, *A*, who had, on the 1st July, 1882, let rooms in a dwelling-house to *B*, sent a letter to the tenant in the following terms:—"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February, 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter.

Held by the Full Bench, with reference to the terms of s. 106 of the Transfer of Property Act, that the letter was not such a notice to quit as the law required, inasmuch as it was not a notice of the lessor's intention to terminate the contract at the end of the month of the tenancy.

Per STRAIGHT, J., *quære*, whether the letter was a notice to quit at all.

Also *per* STRAIGHT, J.—A notice to quit must be certain, at all events, in respect of the date of the determination of the tenancy: in other words, there must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation of the premises, become a trespasser. *Ahearn* v. *Bellman* distinguished.

The judgment of MAHMOOD, J., reversed, and that of OLDFIELD, J., affirmed.

Bradley *v.* Atkinson 899

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5. LANDHOLDER AND TENANT. *Suit by landholder for declaration of right to take land from occupancy-tenant for cultivation of indigo—Wajib-ul arz—Act I of* 1877 (*Specific Relief Act*), *s.* 42.] The zamindars of a village sued an occupancy-tenant for a declaration of their right to maintain a custom which was thus recorded in the *wajib-ul-arz* :—"When necessary, one or two bighas out of the tenants' lands are taken with their consent (*ba khushi*) for sowing indigo" Upon the basis of this entry, they claimed to be entitled to take a portion of the occupancy-holding at a certain period of the year, for the purpose of cultivating indigo.

Held by the Full Bench that the word "*khushi*" used in the *wajib-ul-arz* indicated that the land was only to be taken with the occupancy-tenant's consent, and the document created no right of the nature alleged—namely, to take the land despite the tenant.

Per TYRRELL, J —That the suit was not maintainable under the special provisions of the Specific Relief Act (I of 1877).

Sheobaran *v.* Bhairo Prasad 880

6. ——————————. *Transfer of "right of occupancy"—Lease—Mortgage—"Zar-i-peshgi" lease—Act XII of* 1881 (*N.-W. P. Rent Act*), *ss* 8, 9] The occupancy-tenants of certain land executed a *zar-i peshgi* lease in favour of certain persons, by which, in consideration of a sum of money, it was agreed that the latter should have the right of occupying and cultivating the occupancy-holding as tenants for a term of years at a nominal rent. In pursuance of this agreement, those persons obtained possession. The zamindar thereupon brought a suit against them for ejectment and to have the *zar-i-peshgi* lease set aside.

Held by the Full Bench that the *zar-i peshgi* lease was a transfer of occupancy-rights, within the meaning of s 9 of the N.-W. P. Rent Act (XII of 1881), and was therefore invalid.

Per PETHERAM, C J.—A right of occupancy means nothing but the right to live on and cultivate land and as one's own.

Per STRAIGHT, J.—The last sentence of s 8 of the Rent Act should not be read as declaring that any occupancy-tenant may sublet his land, but that the scope of the proviso is limited to tenants who actually occupy or cultivate land under a written lease, without having acquired a right of occupancy. *Haji Hidayatullah* v. *Ram Niwaz Rai* referred to.

Abadi Husain *v.* Jurawan Lal 866

——————————. *See* Jurisdiction, 2, 3, 6, 7. Occupancy-tenant.

LEX LOCI. *See* Majority, age of.

LIMITATION. *Burden of proof—Instalment bond—Indorsement of payment of instalments.*] Where a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred If when the plaintiff has proved his case the facts show that the cause of action accrued at a date earlier than the period of limitation, and the plea of limitation has been set up by the defendant, the latter will be entitled to take advantage of the plaintiff's evidence that the claim is barred, and to have judgment given in his favour.

The obligee of a bond, by which the obligor covenanted to pay the sum of Rs 3,200 by annual instalments of Rs 200, and in which it was also agreed that payments of the instalments should be indorsed on the bond, brought a suit against the obligor, alleging default in payment and claiming to recover the amount of the bond. He gave credit for payment of the instalments for seven years, and alleged that his cause of action arose upon default in payment of the eighth instalment The bond showed on its face indorsements of the payments for which credit was given. The obligor alleged that no instalments were paid after the third year; that, therefore, the debt became due at an earlier date than that stated by the plaintiff, and that the claim was barred by limitation.

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Held that inasmuch as the defendant adduced no evidence to show that the latter instalments were not paid, and inasmuch as the evidence produced by the plaintiff did not show that the debt accrued at a date earlier than the limitation period, the plea of limitation failed.

Radha Prasad Singh *v.* Bhajan Rai 677

LIMITATION. *See* Act IX of 1871, sch ii, No. 132. Civil Procedure Code, s. 407 (*c*). Execution of decree 1, 6. Pre emption 6.

LIS PENDENS. *See* High Court's powers of revision 4.

MAGISTRATE, POWERS OF—*Act XLV of* 1860, *s* 71—*Criminal Procedure Code, ss.* 39, 235—*Rioting, grievous hurt, and hurt—Punishment for more than one of several offences—Powers of Magistrate of first class conferred on Magistrate of second class during trial—Power to sentence as first class Magistrate—Charge, alteration of.*] On the 8th August, 1884, a Magistrate of the second class began an inquiry in a case in which several persons were accused of rioting and of voluntarily causing grievous hurt On the 6th September, the powers of a Magistrate of the first class were conferred on the Magistrate by an order of Government, which was communicated to him on the 8th September. On the 9th September, the case for the prosecution having closed, the Magistrate framed charges against each of the accused under ss 323 and 325 of the Penal Code, recorded the statements of the accused and the evidence for the defence, and, on the 10th September, convicted the accused of all the charges passing upon each of them in respect of each charge sentences which he could pass as a Magistrate of the first class, but could not have passed as a Magistrate of the second class. On appeal the Sessions Judge, on the ground that the prisoners had committed the offence described in s. 148 of the Penal Code, held that the sentences passed by the Magistrate were illegal, as being inconsistent with the provisions of s. 71. paragraphs 2 and 4 ; and he accordingly reduced the sentences of imprisonment which the Magistrate had passed to the maximum of imprisonment which the Magistrate could have inflicted under s. 148.

Held by the Full Bench (PETHERAM, C. J., and BRODHURST, J., dissenting) that the sentences passed by the Magistrate were legal.

Per OLDFIELD, MAHMOOD, and DUTHOIT, JJ., that, with reference to the terms of s. 39 of the Criminal Procedure Code, a Magistrate of the second class who has begun a trial as such and continued it in the same capacity up to the passing of sentence, and who, prior to passing sentence, has been invested with the powers of a Magistrate of the first class, is competent to pass sentence in the case as a Magistrate of the first class

Per OLDFIELD and DUTHOIT, JJ., that the provisions of s 71 of the Penal Code had no application to the case, inasmuch as the offences of causing grievous hurt and hurt formed no part of the offence of rioting.

Per PETHERAM, C. J., that a case must be taken to be tried upon the day the trial commences ; that, for all the purposes of the trial, the Magistrate in this case retained the *status* of a Magistrate of the second class ; and that he was, therefore, not competent to pass sentence as a Magistrate of the first class.

Also *per* PETHERAM, C. J., that the Judge, in this case, had no power to alter the charge or to frame a new charge in any way.

Per BRODHURST, J., that the sentences passed by the Magistrate were, as a whole, illegal ; that if he had convicted the accused under s. 148 of the Penal Code, his order would, under the circumstances, have been legal ; that a Court of Appeal is not competent to alter the finding of a Magistrate, so as to convict an accused person of an offence which the Court of which the order is in appeal was not competent to try ; and that a member of an unlawful assembly, some members of which have caused grievous hurt, can be legally punished for

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the offence of rioting as well as for the offence of causing grievous hurt. *Empress* v. *Dungar Singh* referred to.
Queen-Empress *v* Parshad ... 414

MAGISTRATE OF THE FIRST CLASS. *See* Criminal Procedure Code, s 437.

MAJORITY. *Capacity to contract--Muhammadan over* 16 *years of age before Act IX of* 1875 *came into force—Muhamadan Law—Act IX of* 1872 (*Contract Act*), *s.* 11 *—Act XL of* 1858 (*Bengal Minors Act*), *s.* 26 *—Act IX of* 1875 (*Majority Act*), *s* 2 (c).] In a suit upon a bond executed on the 5th June, 1875 by a Muhammadan who at that date was sixteen years and nine months old, the defendant pleaded that at the time when the bond was executed he was a minor, and that the agreement was therefore not enforceable as against him.

Held that the defendant, having at the date of the execution of the bond, reaehed the full age of sixteen years, and so attained majority under the Muhammadan law, which, and not the rule contained in s. 26 of the Bengal Minors Act (XL of 1858), was the law applicable to him under s 2 (*c*) of the Indian Majority Act (IX of 1875) before the latter Act came into force, was competent in respect of age to make a contract in the sense of s. 11 of the Contract Act (IX of 1872), and the agreement was therefore enforceable as against him.

The rule contained in s. 26 of the Bengal Minors Act is limited by its terms to "the purposes of that Act," which provides exclusively for the case of the persons and property of minors possessed of property which has not been taken under the protection of the Court of Wards; and it is to such persons only, when they have been brought under the operation of the Act as in it provided, that the prolongation of nonage under s 26 applies.
Damodar Das *v.* Wilayet Husain 763

MAJORITY, AGE OF. *Minor, suit against— Civil Procedure Code, s.* 443 *—European British subject not domiciled in India—Act IX of* 1875—*Contract—Lex loci—Act IX of* 1872, *s.* 11—*Cheque—Liability of indorser—Act XXVI of* 1881, *ss* 35, 43] A cheque was indorsed in blank by a European British subject who, at that time, was under twenty years of age and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured, and a suit was then brought by the Bank which had cashed the cheque to recover the amount from the indorser and the drawer The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was a mere matter of form, and he would not be liable for the amount, and that the Bank would only cash the cheque when indorsed by him, and in consequence he consented to indorse it, but that he did so without any intention of incurring liability as indorser, that he received no consideration, and that his indorsement was in blank and not in favour of the Bank, and was converted into a special indorsement without his knowledge and consent. The Court held that at the time of indorsement the indorser was a minor under English law, and dismissed the suit on the ground of minority

Held that if the Court was satisfied of the fact of the defendant's minority, it should have complied with the provisions of s. 443 of the Civil Procedure Code.

Held that, assuming the indorser to have been *sui juris*, the indorsement, taken in conjunction with the facts proved, established a contract by which the indorser was bound to pay the cheque.

Per STRAIGHT, Offg. C. J., and DUTHOIT, J., that it was by no means clear or certain that there was any rule of international law recognizing the *lex loci contractus* as governing the capacity of the person to contract; but that, assuming such a rule to be established; the specific limitation of the Indian Majority Act (IX of 1875) to "domiciled persons" necessarily excluded its application to European British subjects not domiciled in British India; that s. 11 of the Contract Act must be interpreted as declaring that the capacity of a

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person in point of age to enter into a binding contract was to be determined by his own personal law, wherever such law was to be found; that this rule was not affected by the Majority Act, so far as concerned persons temporarily residing but not domiciled in British India, whose contractual capacity was still left to be governed by the personal law of their personal domicile; and that such law, in the case of European British subjects, was the common law of England, which recognized twenty-one as the age of majority

Per OLDFIELD, J., that by the rule of the *jus gentium* as hitherto understood and recognized in England, the *lex loci* would govern in respect to the capacity to contract, but that in framing the Indian Majority Act, which was the *lex loci* on the subject in India, the Legislature would appear not to have adopted that rule, but, by limiting the operation of the Act to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile

Per BRODHURST, J, that Act IX of 1875 was intended by the Legislature to be applicable, and in fact was applicable, only to European British subjects domiciled in those parts of India referred to in s. 1, and that to any other European British subject whose domicile was in England, but who was temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attached until he he had attained the age of twenty-one years.

Rohilkhand and Kumaon Bank *v.* Row 490

MARSHALLING. *See* Mortgage 5

MESNE PROFITS. *See* Civil Procedure Code, s. 244.

MINOR, SUIT AGAINST. *See* Majority, age of.

MISSING PERSON. *Act I of* 1872, *s.* 108—*Muhammadan Law—Act VI of* 1871, *s* 24.] The rule contained in s. 108 of the Evidence Act governs the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Muhammadan law is applicable.

Per MAHMOOD, J.—The rule of the Muhammadan law, that a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth is, according to the most authoritative texts of the Muhammadan law itself, a rule of evidence and not of "succession, inheritance, marriage, or caste, or any religious usage or institution" within the meaning of s. 24 of Act VI of 1871.

Mazhar Ali *v.* Budh Singh 297

MITAKSHARA. *See* Hindu Law.

MORTGAGE. *Act XII of* 1881, *s.* 8—*Act X of* 1859, *s.* 6—*Occupancy-tenure —Sir-land.*] Where land, originally the sír of a proprietor, has been transferred to a mortgagee, and has in his hands lost its character of sír, and has been leased to a tenant on the usual conditions of a tenancy, which otherwise do not bar the acquisition of a right of occupancy in the land, such a right will be acquired by twelve years' occupancy under s. 8 of the Rent Act.

In 1846, *B* mortgaged a share in a village, together with certain land which was recorded as his sír, and which was so described in the deed of mortgage. After the mortgage it ceased to be recorded as his sír, and was recorded as land held by tenants in the same way as other lands in the estate. In 1857 it was leased to *S*, and in 1863 to *H*, and from 1863 to 1882 remained in the possession of the last-mentioned lessee In 1882 *B* redeemed the mortgage, and subsequently brought a suit against *H* to establish that the land was his sír, and for possession of it.

Held by the Full Bench that there being nothing in the terms of the mortgage-deed to indicate that the land was transferred to the mortgagee to be held as sír, and the land having ceased to be recorded as the sír of the proprietor, and not having been leased as the sír of the lessor, it had not retained its character as sír when the defendant's

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tenancy commenced, so as to prevent him from acquiring a right of occupancy therein under the provisions of s. 8 of the Rent Act.

Per MAHMOOD, J., that there is nothing in the law to prevent a zamíndár from relinquishing his rights in sír land and converting it into land held by ordinary tenants; that the mortgage-deed of 1846 showed that the sír right in the land in suit had been relinquished by the mortgagor; and that the sír land once relinquished by the zamíndár ceases to have that character, and cannot prevent the accrual of the occupancy-right within the meaning either of s. 6 of Act X of 1859 or of s. 8 of Act XII of 1881.

The right of occupancy conferred by the Legislature upon cultivators of more than twelve years' standing is a right wholly independent of the wishes either of the zamíndár or his mortgagee in possession, and when a cultivator acquires such a right, it cannot be taken as in the nature of a grant from either of them. The right of occupancy may thus be acquired during the currency of a usufructuary mortgage and during the period of the mortgagee's possession of the zamíndári rights, and the zamíndár upon redeeming the mortgage cannot disturb the possession of such occupancy-tenants on the ground that, when he mortgaged the zamíndári, it was free of such occupancy-tenures. *Heeroo* v. *Dhoree* referred to.

Harpal Singh *v.* Bal Gobind 536

2 MORTGAGE. *Annulment of settlement—Fresh settlement—Act XIX of 1873, ss. 43, 159, 165*] A settlement of land belonging to *G*, and which he had mortgaged, having been annulled under s. 158 of the N.-W. P. Land Revenue Act (XIX of 1873), the land was farmed by the Collector of the district under s 159. The revenue having fallen into arrears, the Collector, under the same section, took the land under his own management. Subsequently, under ss. 165 and 43 of the Act, the land was settled with *G's* wife.

Held that the Court was precluded by the terms of s. 241 (*f*) of the Revenue Act from entering into the question whether the settlement was legally made by the Collector with the wife of the mortgagor; that she must therefore be taken to represent such rights and interests as the mortgagor possessed, and that consequently the estate was liable in her hands for the mortgage, and the mortgagee was entitled to claim foreclosure against her.

Bari Bahu *v.* Gulab Chand 454

3. ————. *First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property.*] The purchasers of the equity of redemption of land which had been mortgaged in 1866 and 1874 to different persons paid off the prior mortgage. The second mortgagee sued to bring the property to sale in satisfaction of his mortgage.

Held that the prior mortgage was not extinguished, and that the purchaser of the equity of redemption had, by paying off that mortgage, acquired an equitable right to its benefits, which they could use against the second mortgage. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* followed.

Per OLDFIELD, J., (MAHMOOD, J., dissenting), that the prior mortgage afforded a defence ugainst the claim of the second mortgagee seeking to bring the property to sale. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* followed.

Per MAHMOOD, J., that the ruling of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* did not go beyond laying down the proposition that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes; but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession.

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Also *per* MAHMOOD, J., that although the persons who had paid off the prior mortgage were entitled to claim its benefits, they could not be understood to have acquired rights greater than those which the prior mortgagee himself possessed; that as holders of the equity of redemption they could not resist the suit which aimed at enforcing a valid security, and, as persons entitled to the benefits of the prior mortgage, they were at best in the position of assignees of that mortgage; that the union of the two capacities could not confer upon them rights higher than those which the mortgage they had paid off created; that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security without paying off the prior mortgage, so long as such enforcement does not clash with the rights secured by the prior mortgage; and that, therefore, the purchaser of the equity of redemption held that right subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the prior mortgage did not place the equity of redemption on a better footing, though it entitled them to the benefits of that mortgage secured to them in the same manner as to the original mortgagee whose rights they had acquired by subrogation. *Gaya Prasad* v. *Salik Prasad*, *Ramu Narkan* v *Subbaraya Mudali*, and *Mul Chand Kuner* v. *Lallu Trikam* referred to.

Sirbadh Rai *v.* Raghunath Prasad 568

4. MORTGAGE—*First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property—Registered and unregistered instruments—Optional and compulsory registration—Act III of* 1877, *s.* 50.] At a sale in execution of a decree, *J* purchased certain property which was at that time subject to two mortgages; the first under an unregistered deed in favour of *M* and dated in 1872, and the second under a registered deed in favour of *L* and dated in 1880 The registration of the latter both deeds was optional, the former under Act VIII of 1871 and the latter under Act III of 1877. *J* subsequently satisfied the mortgage under the registered deed of 1880, which was delivered to him. *M* then brought a suit to recover the money due to him under the mortgage-deed of 1872 by sale of the mortgaged property.

Held by OLDFIELD, J., that applying the rule laid down by the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, *J*, having paid off the mortgage under the registered deed of 1880, should have the benefits of that mortgage, and was entitled to set up the deed which he held against the unregistered deed of 1872, against which under s. 50 of the Registration Act (III of 1877) it would take effect as regards the property comprised in it. *Lachman Das* v. *Dip Chand* referred to.

Per MAHMOOD, J., that the word "unregistered" in s 50 of the Registration Act must, in reference to the circumstances of the present case, be read as "not registered under Act VIII of 1871," and that, so reading the section, the registered mortgage-deed of 1880 was entitled to priority over the unregistered mortgage-deed of 1872. *Lachman Das* v. *Dip Chand* and *Sri Ram* v. *Bhagirath Lal* distinguished.

Also *per* MAHMOOD, J, that the position of *J*, by reason of his having paid off the registered mortgage of 1880, could at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff was suing; that such priority could not enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage of 1880; and that, as a consequence, the sale of the property in enforcement of the mortgage of 1872 should be allowed to take place, but subject to the rights of priority which *J* had acquired by reason of his having paid off the registered mortgage of 1880. *Sirbadh Rai* v. *Raghunath Prasad* and *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* referred to.

Janki Prasad *v.* Sri Matra Mautangui Debia 577

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5 MORTGAGE. *Purchaser of part of mortgaged property without notice —Suit for sale of whole property in satisfaction of mortgage—Marshalling—Apportionment*] The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bonâ fide* purchaser for value, without notice, of a portion of property, the whole of which was subject to a prior incumbrance. *Tulsi Ram* v. *Munnoo Lal*, *Nowa Koer* v. *Abdul Rahim*, *Bishonath Mookerjee* v. *Kisto Mohan Mookerjee*, and *Khetoosee Cherooria* v. *Banee Madhub Doss* referred to.

The mortgagees of two properties, one of which had, subsequently to the mortgage, been purchased for value *bonâ fide* by one who had no notice of the incumbrance, brought a suit to enforce their lien against both the properties originally owned by the mortgagor, impleading as defendants both the mortgagor and the purchaser.

Held that, while there was no doubt that, if the purchaser was compelled to pay more than the share of the mortgage debt apportioned on the property purchased by him, he would be entitled to contribution, yet, in a suit so framed, and having regard to the array of parties, such an apportionment could not be made at the stage of second appeal.

Rodh Mal *v.* Ram Harakh 711

6. ——————. *Transfer of mortgaged property by mortgagee in exchange for similar property—Right of mortgagor to property acquired by exchange*] In 1865 *N* was in possession of six shops in a market-place at Etáwah. He was in possession of two as mortgagee and of the remaining four as proprietor. The Municipal Committee of Etáwah, having decided to establish the market in a fresh place and to use the site of the old market for other purposes, arranged with *N* to take the sites of his six shops in the old market-place and to give him in lieu of them sites for six shops in the new Under this arrangement he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage-money and cost of constructing the shop.

Held that the claim could not be allowed, inasmuch as it could be justified only by proof of an agreement binding upon the parties at the time when the transaction occurred that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made.

Nidhi Lal *v.* Mazhar Husain 436

7. ——————. *Usufructuary mortgage— Satisfaction of mortgage debt from usufruct—Suit for whole mortgaged property by some of several mortgagors.*] In a suit by some of several co-mortgagors to redeem the entire property mortgaged, on the ground that the mortgage-debt had been satisfied out of the usufruct,—*held* that the plaintiffs could only claim their own shares, and the Court of first instance should determine the extent of the shares after making the other co-mortgagors parties.

Fakir Bakhsh *v.* Sadat Ali 376

——————. *See* Civil Procedure Code, s. 295. Occupancy-tenant. Pre-emption, 15. Release.

—————— by conditional sale. *See* Pre-emption 6, 7.

MOSQUE *Religious endowment—Form of suit—Right to sue—Civil Procedure Code, ss* 30, 539.] Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance, and is competent to maintain a suit against any one who interferes with its exercise, irrespective of the provisions of ss. 30 and 539 of the Civil Procedure Code.

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S. 30 of the Civil Procedure Code applies only to cases in which many persons are *jointly* interested in obtaining relief, and not to cases in which an individual right has been violated

Zafaryab Ali v. *Bakh'awar Singh* referred to. *Jan Ali* v. *Ram Nath Mundul* dissented from.

Jawahra *v.* Akbar Husain 178

MUHAMMADAN ECCLESIASTICAL LAW. *See* Act XLV of 1860, s. 296.

MUHAMMADAN LAW. *Inheritance—Devolution not suspended till payment of deceased ancestor's debts.*] A creditor of *A*, a deceased Muhammadan, under a hypothecation bond, obtained a decree on the 20th December, 1876, for recovery of the debt by enforcement of lien against *M*, one of *A's* heirs, who alone was in possession of the estate; and, in execution of the decree, the whole estate was sold by auction on the 21st March, 1878, and purchased by the decree-holder himself. *J*, another of *A's* heirs, was not a party to these proceedings. On *J's* death, her son and heir, *A. H*, conveyed to *M. A* the rights and interests inherited by him from his mother, namely, her share in *A's* estate. The purchaser of the share thereupon brought a suit against the decree-holder for its recovery.

Held that immediately upon the death of *A*, the share of his estate claimed in the suit devolved upon *J*; that she being no party to the decree of the 20th December, 1876, her share in the property could not be affected by that decree, nor by the execution sale of the 21st March, 1878; that upon her death that share devolved upon her son, who conveyed his rights to the plaintiff; that the plaintiff was therefore entitled to recover possession of the share which he had purchased; but that he could not do so without payment to the defendant of his proportionate share of the debts of *A*, which were paid off from the proceeds of the auction-sale of the 21st March, 1878. *Jafri Begam* v *Amir Muhammad Khan* followed.

Muhammad Awais *v.* Har Sahai 716

2. ——— ———. *Inheritance—Devolution not suspended till payment of deceased ancestor's debts—Decree in respect of deceased ancestor's debts passed against heir in possession of estate—Decree not binding on other heirs not parties thereto and not in possession, so as to convey their shares to auction-purchaser in execution—Recovery of possesion by other heirs contingent on payment of proportionate shares of debt for which decree was passed.*] Upon the death of a Muhammadan intestate who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon, and suspended till, payment of such debts.

A decree relative to his debts, passed in a contentious or non-contentious suit against only such heirs of a deceased Muhammadan debtor as are in possession of the whole or part of his estate, does not bind the others heirs who, by reason of absence or other cause, are out of possession, so as to convey to the auction-purchaser in execution of such a decree the rights and interests of such heirs as were not parties to the decree.

In execution of a decree for a debt due by a Muhammadan intestate, which was passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree-holder put up for sale and purchased certain property which formed part of the said estate. One of the heirs, who was out of possession, and who was not a party to these proceedings, brought a suit against the decree-holder for recovery of a share of the property sold in execution of the decree, by right of inheritance.

Held by the Full Bench that the plaintiff was not entitled to recover from the auction-purchaser in execution of the decree possession of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debt for which the decree was passed, and in satisfaction whereof the sale took place.

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Wahid-un-nisa v. *Sheobrattun, Assamathem Nessa Bibi* v *Roy Lutchmeeput Singh, Mazhar Ali* v. *Budh Singh, Bachman* v. *Bachman, Hamir Singh* v. *Musammat Zakia,* and *Muttyjan* v. *Ahmed Ally,* referred to by MAHMOOD, J.

Jafri Begam *v.* Amir Muhammad Khan 822

3. MUHAMMADAN LAW. *Muhammadan widow—Dower—Widow's heir —Determination of amount of dower*] A Muhammadan widow lawfully in possession of her husband's estate occupies a position analogous to that of a mortgagee, and her possession cannot be disturbed until her dower-debt has been satisfied, and after her death her heirs are entitled to succeed her in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery.

Held that the ruling of the Court in *Balund Khan* v. *Janee* that where a defendant is found to be in possession of landed property in lieu of dower, and it is held that the plaintiff is not entitled to sue for possession of the property until such claim for dower has been satisfied, it is not necessary to determine the question of the amount of such dower, the matter being one which could be settled properly in a suit for an account of what was due as dower, was not applicable to a case where the plaintiffs seeking to recover possession did not claim as heirs of the widow's husband, but as heirs of the widow herself, and where the decree for possession passed in their favour would remain undisturbed even if an amount less than that fixed by the lower appellate Court were found to be what was due as dower.

Azizullah Khan *v.* Ahmad Ali Khan 353

——— ———. *See* Act XLV. of 1860, s. 296. Majority. Missing person. Pre-emption, 8.

NOTICE. *Bonâ fide transferee for value of mortgaged property—Ignorance of existing incumbrance.*] *Held* that a statement in answer to interrogatories, which was made by the purchaser of mortgaged property, to the effect that, at the time of the purchase, he was aware of the mortgage and believed that it had been satisfied, was no proof of the purchase having been made after notice of a prior mortgage, inasmuch as it was inconsistent with the knowledge of an *existing* incumbrance.

Sheo Dayal Mal *v.* Hari Ram 590

NOTICE. *See* Civil Procedure Code, ss. 492, 494.

NOTICE TO QUIT. *See* Landholder and tenant 3, 4.

OBJECTIONS BY RESPONDENT TO DECREE *See* Appeal.

OCCUPANCY, RIGHT OF. *See* Act XII of 1881, ss. 7, 9. Landholder and tenant 2, 5, 6.

OCCUPANCY-TENANT. *Suit for ejectment—Act by tenant inconsistent with purpose for which land was let—Mortgage of occupancy-holding—Cancelment of mortgage before suit for ejectment—Act XII of* 1881 (*N. W P. Rent Act,*) *ss.* 9, 93, (*b*), 149] An occupancy tenant made a usufructuary mortgage of his holding, and afterwards had the land and the mortgage-deed returned to him, and the mortgage was cancelled. Subsequently, the landlord instituted a suit for ejectment, on the ground that by the mortgage the tenant had committed an act inconsistent with the purpose for which the land was let, within the meaning of Act XII of 1881 (N.-W. P Rent Act), s. 93 (*b*).

Held by OLDFIELD, J., that, apart from the question whether executing a mortgage of his holding was an act within the meaning of s 93 (*b*) of the Rent Act, the mortgage having been cancelled, there was no cause of action left, and the penalty should not be enforced, with reference to s. 149

Held by MAHMOOD, J., that the occupancy tenure could not be brought to an end except on grounds clearly provided by the law; and the execution of the mortgage, though illegal and void, was not "any act or omission detrimental to the land" or "inconsistent with

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the purpose for which the land was let" within the meaning of s 93 (*b*) of the Rent Act, and furnished no ground for ejectment. *Gopal Pandey* v. *Parsotam Das* and *Naik Ram Singh* v. *Murli Dhar* referred to.

Also *per* MAHMOOD, J —The terms of s. 93 (*b*) of the N.-W. P. Rent Act apply, *exempli gratia*, to cases in which land is given to a tenant for purposes of cultivation, and is used by him for building or other purposes.

Debi Prasad *v.* Har Dayal 691

OCCUPANCY-TENURE. *See* Mortgage, 1.

OFFENCE. *See* Act XLV of 1860, ss 224, 225.

OFFENCE MADE UP OF SEVERAL OFFENCES. *Rioting—Grievous hurt—Criminal Procedure Code, s. 235—Act XLV of* 1860, *ss.* 146, 147, 149, 325] Three persons who were convicted (i) of riot under s 147 of the Penal Code, (ii) of causing grievous hurt in the course of such riot, were respectively sentenced to six months' rigorous imprisonment under s 147, and three months' rigorous imprisonment under s. 325.

Held by PETHERAM, C. J., and STRAIGHT and TYRRELL, JJ., that inasmuch as the evidence upon the record showed that the three prisoners had committed individual acts of violence with their own hands, which constituted distinct offences of causing grievous hurt or hurt separate from and independent of the offence of riot, which was already completed, and the fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under s 325 of the Penal Code, the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress* v *Ram Partab* distinguished.

Per BRODHURST, J, that the evidence showed that only one of the three prisoners had caused grievous hurt with his own hands, and that the others could only be properly convicted of that offence under the provisions of s. 149 of the Penal Code, but that the separate sentences passed under ss. 147 and 325 were not illegal *Queen-Empress* v. *Dungar Singh* followed.

Also *per* BRODHURST, J —Illustration (*g*) of s 235 of the Criminal Procedure Code does not apply merely to the case of persons who, in addition to the offence of rioting, have with their own hands committed the further offences of voluntarily causing grievous hurt and of assaulting a public servant when engaged in suppressing a riot ; and the convictions referred to in the Illustration relate especially to convictions obtained under the provisions of s. 149 of the Penal Code.

Queen-Empress *v.* Ram Sarup 757

OFFENCES, DISTINCT. *See* Criminal Procedure Code, s 35

OFFICIAL ASSIGNEE, CLAIM BY, TO ATTACHED PROPERTY. *See* Execution of decree 4.

PARDON, tender of, to accomplice who has pleaded guilty. *See* Criminal Procedure Code, s 338.

PARTITION OF MAHAL. *See* Jurisdiction 9. Pre-emption 10.

PARTNERSHIP, SUIT FOR DISSOLUTION OF. *See* Jurisdiction, 10.

PLAINT, amendment of. *See* Pre-emption 4.

——, rejection, &c, of. *See* Civil Procedure Code, s. 53.

PRACTICE. *Accused not defended—Court to test statements of witnesses for prosecution.*] *Per* PATHERAM, C J.—Where an accused person is not defended, the Court should, in the interests of justice, test the statements of the witnesses for the prosecution by questions in the nature of cross-examination.

Queen-Empress *v.* Kallu 160

——. *Appeal—Security for costs—Civil Procedure Code, s* 549—*Application that appellant be required to give security—Order directing appellant to show cause—Absence of counsel to support application—Dismissal of application—Application to restore case to register—Civil Procedure Code, ss.* 98, 99, 647.] A petition was made under s. 549 of the Civil Procedure Code, praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not

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pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, no one appeared to support it or to show cause against it, and it was accordingly rejected. An application was subsequently made on behalf of the petitioner, praying that the case might be restored to the register, on the ground that counsel for the petitioner was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause, the petition should have been granted, and the absence of petitioner's counsel was immaterial.

Held that the matter was dealt with by s. 98 of the Civil Procedure Code, and that s. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made s. 99 the rule by which the Court was to be guided.

Held also that although no general rule could be laid down that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances, in the present case, taking the circumstances into consideration, an absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition to the register.

Lakhmi Chand *v.* Gatto Bai 542

PRACTICE. *See* Civil Procedure Code, s. 53. ss. 492, 494. Witnesses.

PRE-EMPTION. *Acts or omissions by pre-emptor's authorised agent binding on pre-emptor.*] It is a general rule of pre emption that any act or omission on the part of a duly authorized agent or manager of the pre-emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself.

Harihar Dat *v* Sheo Prasad 41

2. ———————. *Conditional decree—"Finality" of decree—Holiday—Act XV of 1877, s. 5, sch. ii, No 156—Execution of decree—Sale of property by decree-holder before obtaining possession—Decree holder's right not forfeited*] A decree in a suit to enforce a right of pre emption directed that the purchase-money should be paid within a certain period from the date the decree became "final." The period of limitation prescribed for an appeal from this decree expired on a day when the Court was closed. *Held* that the decree did not become "final" before the Court re opened *Shaikh Ewaz* v. *Mokuna Bibi* followed.

The holder of a decree enforcing a right of pre-emption, who subsequently to the date of the decree sells the property to a "stranger" and permits the latter to pay the purchase-money decreed into Court, does not by such conduct debar himself from obtaining possession of the property in execution of the decree.

Rajjo v. *Lalman* and *Sarju Prasad* v. *Jamna Prasad* distinguished.

Ram Sahai *v.* Gaya 107

3. ———————. *Hindus—Local custom—Sale to a stranger.*] The right of pre-emption, when it exists among Hindus, is a matter of contract or custom agreed to by the members of a village or community. Such a custom is not properly described as attached to the land, and as soon as any members of a Hindu community, who have agreed to be governed by it, sell to any one who is a stranger to the agreement, the land is no longer subject to pre-emption.

Hira *v.* Kallu 916

4. ———————. *Hindu widow—Joinder of plaintiffs, one of whom had no right to sue for pre emption—Amendment of plaint.*] The plaintiffs in a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village, which gave the right to "co-sharers," alleged themselves to be jointly interested in the village, and, in their plaint, claimed relief

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jointly. One of the two plaintiffs was the widow of a co-sharer in the village, who, at the time of his death, was a member of a joint Hindu family.

Held that, inasmuch as the widow had only a right of maintenance out of the estate of her husband, she was not a co-sharer in the village, and therefore had no right to claim to pre-emption.

Held, further, with reference to the manner in which the plaint was framed, that the other plaintiff could not claim pre-emption entirely on his own account without amending the plaint, but that it was too late for him to take such a course. *Damodar Das* v. *Gokal Chand* referred to.

Karan Singh *v.* Muhammad Ismail Khan 860

5. PRE-EMPTION. *Joint purchase by co-sharers and stranger—Pre-emptor not compelled to pre-empt share purchased by co-sharers*] If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned.

Harjas *v.* Kanhya 118

6. ————. *Mortgage by conditional sale—Limitation—Acquiescence—Equitable estoppel—Wazib-ul-arz—"Nearer co-sharer."*] The two joint owners of a two annas eight pies share in a village jointly executed two deeds of mortgage by conditional sale, each for a share of one anna four pies, in favour respectively of *R* and *A*, co-sharers in the village, and related to the vendors. In 1875 the conditional sale in favour of *R* became absolute, and he was recorded as proprietor of half the share of the vendors and obtained possession thereof. In 1882, *A* foreclosed his mortgage and obtained possession of the other half share. *R* thereupon claimed the right to purchase the half share so acquired by *A*, on the allegation that he had a right of pre-emption in respect thereof, having become the vendee in 1875 of the other half share, and therefore being the "nearer co-sharer" of the vendors within the meaning of the *wajib-ul-arz*, and also being nearer in relationship to the vendors than *A*. The *wajib-ul-arz* provided that each co sharer was competent to transfer his own share, but that, when making a transfer, it was incumbent on him to notify the same to his near co-sharer, and, on his refusal, to other sharers in the village. The lower appellate Court held that the plaintiff was estopped from preferring a claim to pre-emption, on the ground that he had acquiesced in the conditional sale in favour of the defendant, and also that he had no right to pre-emption under the *wajb-ul-arz*.

Held that inasmuch as from 1875 to 1882 the only owners of the two annas eight pies share were the plaintiff and the mortgagors, they were the only two co-sharers in respect of this particular share, although there were other co-sharers in the village; that the plaintiff must, therefore, be regarded as a "nearer co sharer" of the vendors than the defendant within the meaning of the *wajib-ul-arz*, and that as such he was entitled to claim pre-emption.

Held also that the right of pre-emption which arose upon the sale was a new right, and not the same as that which arose at the time of the mortgage, inasmuch as the *wajib-ul-arz* distinctly contemplated the right of pre-emption as arising upon the two different events of mortgage and sale; that the alleged acquiescence of the plaintiff pre-emptor therefore occurred at a time when the right claimed by him was not yet in existence, and that consequently the claim was not barred.

Rup Narain *v.* Awadh Prasad 478

7. ————. *Mortgage by conditional sale—Wajib-ul-arz—"Transfer"—Act IV of* 1882, *s.* 58.] A clause in the *wajib-ul-arz* of a village gave a right of pre-emption in respect of "transfer" by the sharers of their rights and interest by sale and mortgage.

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Held that a deed of conditional sale of a share in the village, which did not transfer possession, was a transfer of an interest in the village, and was sufficient to let in the right of pre-emption. *Sheoratan Kuar* v. *Mahipal Kuar* followed.

Aziman Bibi *v.* Amir Ali 343

8. PRE EMPTION. *Muhammadan Law—Muhammadan vendor and pre-emptor and Hindu purchaser—Act VI of* 1871 (*Bengal Civil Courts Act*), *s.* 24—"*Religious usage or institution*"—"*Parties.*"] *Held* by the Full Bench that, in a case of pre-emption, where the pre-emptor and the vendor are Muhammadans and the vendee a non-Muhammadan, the Muhammadan law is to be applied to the matter, in advertence to the terms of s. 24 of the Bengal Civil Courts Act (VI of 1871). *Sheikh Kudratulla* v. *Mahini Mohan Shdha* dissented from.

Per PETHERAM, C. J., and OLDFIELD, J., that, by the provisions of s. 24 of the Bengal Civil Courts Act, the Court was not bound to administer the Muhammadan law in claims for pre-emption; but that, on grounds of equity, that law had always been administered in respect of such claims as between Muhammadans, and it would not be equitable that persons who were not Muhammadans, but who had dealt with Muhammadans in respect of property, knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Muhammadan law, be permitted to evade those conditions and obligations.

Per MAHMOOD, J., that by a liberal construction, the rule of the Muhammadan law as to pre-emption is a "religious usage or institution" within the meaning of s 24 of the Bengal Civil Courts Act, and, as such, is binding on the Courts.

Also *per* MAHMOOD, J., that the word "parties," as used in s 24 of the Bengal Civil Courts Act, does not mean the parties to an action, but must be interpreted with reference to the inception of the right to be adjudicated upon.

Also *per* MAHMOOD, J.—The right of pre-emption is not a right of "*re-purchase*" either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title.

The history and nature of the right of pre-emption discussed by MAHMOOD, J.

Shumsh-ool-nissa v. *Zohra Bibi*, *Chundo* v. *Hakeem Alim-ood-deen*, *Ibrahim Saib* v. *Muni Mir Uddin*, *Moti Chand* v. *Mahomed Hossein Khan*, and *Dwarka Das* v. *Husain Bakhsh* referred to.

Gobind Dayal *v.* Inayatullah: Brij Mohan Lal *v.* Abul Hasan Khan 775

9. ——————. *Notice to pre-emptor of projected sale—Purchase-money Inaction of pre-emptor—Aquiescence*] The plaintiff in a suit to enforce the right of pre-emption alleged that the true consideration for the sale was less than the amount stated in the sale-deed. It was found that he made no communication to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee.

Held that the plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reasonable time, and that, not having done so, he must be taken to have countenanced the completion of the bargain with the vendee and to have waived his right of pre emption.

Bhairon Singh *v.* Lalman 23

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10. PRE-EMPTION. *Partition of property sold on application of vendee—Silence of pre-emptor—Waiver—Estoppel.*] Subsequently to the sale of a one-third share in a village, the vendee applied for partition of the share. A co-sharer, who had a right of pre emption in respect of the sale, made no objection to this application, and the partition was effected. The co-sharer afterwards set up a claim to pre-emption.

Held that there was nothing in the conduct of the pre emptor which could amount to estoppel, or to a waiver of his right of pre-emption.

Motee Sah v. *Goklee* distinguished and dissented from, and *Bhairon Singh* v. *Lalman* referred to, by MAHMOOD, J.

Thamman Singh *v.* Jamal ud-din 442

11. ——————. *Profits of property accruing between purchase and transfer to pre-emptor.*] *B* purchased a share in a mahal on the 3rd January, 1880 (Pus, 1287 fasli). *A* sued *B* and the vendor to enforce his right of pre-emption, and, on the 24th March, 1882 (Chait, 1289 fasli), obtained a final decree enforcing the right. Subsequently *B*, as a co-sharer in the mahal, during 1288 fasli, claimed from *A*, as lambardar of the mahal, the profits of the share for 1288 fasli

Held that the pre-emptive right which was declared in the suit instituted by *A*, when it was once established, existed and must be presumed to have taken effect on the date when the subsequently awarded sale to *B* took place, and therefore there was no period of time during which *B* was properly in possession of the share and entitled to profits from *A* in his character of lambardar, but *A* must be presumed to have been in possession and entitled to the profits from the date of the sale to *B*

Ajudhia *v.* Baldeo Singh 674

12. ——————. *Right pleaded in defence to suit for possession by purchaser of co-sharer's rights and interests.*] A co-sharer of a village, who is in possession, cannot plead the existence of a right of pre-emption in defence to a suit for possession by the purchaser of the rights and interests of another co-sharer.

Ajudhia Bakhsh Singh *v.* Arab Ali Khan 892

13. ——————. *Rival pre-emptor impleaded as defendant—Act XV of* 1877, *sch*, ii. *Nos.* 10, 120—*Remand—Civil Procedure Code, ss.* 562, 564.] Two suits to enforce the right of pre-emption in respect of a particular sale having been instituted, the plaintiff in the one first instituted was added as a defendant to the other. *Held* that, as regards him, the second suit constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property, which was a claim essentially declaratory in its nature ; and there being no specific provision for such a claim in the Limitation Act, it was governed by art. 120 of that Act, and the right to sue accrued when the first suit was instituted.

Durga *v.* Haidar Ali 167

14. ——————. "*Sale*"—*Wajib-ul-arz—Act IV of* 1882, *s.* 54—*Fraudulent omission to transfer by registered instrument.*] The *wajib-ul arz* of a village gave the co-sharers a right of pre-emption in cases where any one of them should wish to "transfer his share, wholly or partly, by sale or mortgage." One of the co-sharers entered into a transaction by which he transferred the possession of his share to a stranger for Rs. 300, and had mutation of names effected in the Revenue Department; but, in order to avoid the right of pre-emption, the parties omitted to execute or register a deed of sale in respect of the transfer.

Held by the Full Bench (MAHMOOD, J., dissenting) that the transaction gave rise to the right of pre-emption within the meaning of the *wajib-ul-arz.*

Per PETHERAM, C.J., that the terms of the *wajib-ul-arz* meant that if any co-sharer transferred his right wholly or partly, the right

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of pre-emption should arise; that although the legal interest in the share was never transferred, the effect of the transaction in question was to transfer absolutely the whole right of possession from the vendor to the vendee, and that it was therefore such a transfer as let in the right of pre-emption.

Per STRAIGHT, J., that inasmuch as the defendants deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right, it was very doubtful whether a Court of equity would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law.

Per OLDFIELD and BRODHURST, JJ., that the failure of the parties to the transfer to comply with the requirements of s 54 of the Transfer of Property Act (IV of 1882), as to the manner in which the transfer should be made, did not alter the nature of the transaction or affect the fact that a sale had been made, and could not affect a pre-emptor's right in respect of it.

Per MAHMOOD, J, that a valid and perfected sale was a condition precedent to the exercise of the pre-emptive right; that in the present case nothing had happened which could properly be termed a "sale" within the meaning of the *wajib-ul-arz;* that the application for mutation of names not having been registered, the provisions of s. 54 of the Transfer of Property Act prevented it from taking effect as a sale, or passing the ownership from the vendor to the vendee; and that therefore, under the *wajib-ul arz*, the right of pre-emption could not arise.

Janki *v.* Girjadat 482

15. PRE-EMPTION. *Simple mortgage—"Transfer"—Wajib ul-arz—Mortgage—Charge—Act IV of* 1882 (*Transfer of Property Act*), *ss.* 58, 100.] The *wajib-ul-arz* of a village gave a right of pre-emption to co-sharers on a transfer (*intikal*) by sale or mortgage (*rahn*) by a co-sharer of "rights and interests" (*hakkiyat*).

Per PETHERAM, C. J., that, as a simple mortgage, as defined in s. 58 of the Transfer of Property Act, 1882, by giving a right to sell, transfers an interest in the property mortgaged, a simple mortgage of his share by a co-sharer created a right of pre-emption under the terms of the *wajib ul arz.*

Per MAHMOOD, J.—The circumstance that possession had not been transferred to the mortgagee was one which had no bearing on the question whether a right of pre emption arose under the terms of the *wajib-ul-arz* in the case of a simple mortgage.

The word "*intikal*," as used in Hindustani, has the broadest meaning in connection with "alienation," "conveyance," "assignment," or "transfer" of rights in immoveable property.

The word "*hakkiyat*" means rights and interests in the legal sense of the phrase.

The word "*rahn*" is a generic word indicating all that is included in the English word "mortgage," and is not limited to usufructuary mortgages, but includes simple mortgages also.

When general words are used in a document, they must be understood in a general sense, unless they are accompanied by any expression limiting or restricting their ordinary meaning, or unless such limitation or restriction arises from necessary implication.

The words "*intikal*," "*hakkiyat*" and "*rahn*" in the *wajib-ul arz* could be understood only in the most general use.

"Mortgage," as understood in Indian law, includes simple mortgage as well as usufructuary, and one is as much a "transfer of an interest in specific immoveable property" as the other.

A simple mortgage is a "transfer," being the transfer of the right of sale.

Held, therefore, by MAHMOOD, J., that a right of pre-emption accrued under the terms of the *wajib-ul-arz* in the case of a simple mortgage by a co-sharer of his share to a "stranger."

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Per BRODHURST, J., that one of the entries in a statement showing the transfers which had taken place in the village at or about the time the *wajib-ul-arz*, was framed, which statement was connected with the *wajib-ul-arz* related to a simple mortgage, from which it appeared that it was the intention that the co-sharers should have the right of pre-emption in all cases of mortgage, whether usufructuary or otherwise, and therefore a right of pre emption accrued under the terms of the *wajib-ul-arz* in the case of a simple mortgage.

Per DUTHOIT, J., that a pre-emptive right was raised by the terms of the *wajib-ul-arz* only upon the occurrence of a transfer of a share in the property of the mahal, and a simple mortgage was not a transfer of property.

OLDFIELD, J.—The word "transfer" used in the *wajib-ul-arz* was not intended to refer to a simple mortgage, but to mortgages where possession of the property passes to the mortgagee.

The obligors of a bond for the payment of money covenanted as follows :- "To secure this money, we have mortgaged a five gandas share out of a ten gandas share in each of the villages, &c. So long as the principal amount with interest is not paid, the hypothecated share will not be sold or mortgaged to any one."

Held (PETHERAM, C.J., dissenting) that the bond created a simple mortgage.

Per PETHERAM, C.J., that the bond gave the obligees a charge only on the property.

Sheoratan Kuar *v.* Mahipal Kuar 258

16. PRE-EMPTION. *Wajib-ul-arz—"Co sharer"—Joint Hindu family.*] The members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's book as a sharer in the mahal, are "co-sharers," for the purposes of pre-emption, in the sense of the *wajib-ul-arz.*

Gandharp Singh *v.* Sahib Singh 184

17. ————. *Wajib-ul-arz—Co-sharers—"Village"—Effect of perfect partition on covenants contained in the wajib-ul-arz.*] The *wajib-ul-arz* of a village contained a covenant among the co-sharers that, in the event of any one of them selling his share, a right of pre-emption should be enforceable, first by a "near share-holder," next by a partner in the *thok*, and, thirdly, by a partner in the village. The village was subsequently divided into three separate mahals by means of a perfect partition under the N.-W. P. Land Revenue Act (XIX of 1873).

Held that the agreement regarding pre-emption remained in force after the partition.

The term "village," as used in the *wajib-ul-arz*, means a definite area of land with houses upon it, and does not necessarily imply a joint ownership of such land, inasmuch as after partition there may remain some community of interest, and things held and used in common by all the inhabitants. Every one who lives in that area has a share in it, and may, therefore, be regarded as a "share-holder" within the meaning of the *wajib-ul-arz.*

Gokal Singh *v.* Mannu Lal 772

18. ————. *Wajib-ul-arz—Partiton of mahal—Mode of division of property where there are several pre-emptors equally entitled.*] The *wajib-ul-arz*, framed in 1856, of a village consisting of several pattis or thoks gave a right of pre-emption to the owners of each thok in respect of property situate in every other thok when such property was sold to any one having no share in the village co-parcenery. The mahal subsequently became the subject of perfect partition under the N.-W.P. Land Revenue Act (XIX of 1873), and one of the pattis was constituted a separate mahal and a new *wajib-ul-arz* was framed for it. Prior to the partition, a proprietor of land both in the pattis which remained in the orginal mahal and in the patti which formed the new mahal sold property in both to a stranger. Thereupon a co-sharer in the original mahal brought a suit for pre-emption in respect of the

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property situated therein which had been sold, excluding the property situate in the new mahal.

Held that the effect of the partition was to exclude property situate in the mahal from the operation of the *wajib-ul arz* framed in 1856, and to place it under new conditions as to the right of pre-emption; that the plaintiff could, after the separation, exercise no such right against and in respect of shareholders and property so separated, nor could the separate shareholders exercise any right of property remaining in the mahal from which they had separated; and that the suit to pre-empt that portion only of the property sold which was situate in the original mahal was maintainable. *Durga Prasad* v. *Munsi, Hulasi* v. *Sheo Prasad, Kashi Nath* v. *Mukhta Prasad, Mootee Shah* v. *Musammat Gokli, Ram Prasad* v. *Buljeet Singh, Oomur Khan* v. *Murad Khan* and *Salig Ram* v. *Debi Prasad* referred to.

Per MAHMOOD, J.—The rule of the Muhammadan law, that where more persons than one owning the property in virtue of which the pre-emptive right exists appear for the purpose of suing, their rights are to be taken as equal *per capita*, with reference to the number of pre-emptors and not with reference to the number of the shares of each pre-emptor in such property, is so consistent with justice, equity and good conscience that it must be followed in cases of rival suits for pre-emption under the *waj b-ul arz*, where there is nothing to show that the rival pre-emptors are not equally entitled.

Jai Ram *v* Mahabir Rai, &c, ... 720

19. PRE-EMPTION. *Wajib-ul-arz—Purchase of share subsequent to sale—Purchaser's right of pre-emption.*] Where there is a right of pre-emption under the *wajib-ul-arz*, which a shareholder could claim and enforce in respect of a sale of property, a person purchasing the said share-holder's interest in the village subsequently to the sale cannot claim and enforce pre-emption as his vendor might have done.

Sheo Narain *v.* Hira 535

20. ————. *Wajib-ul-arz—"Rights and interests"—"Qimat"—"Sale" Exchange.*] The *wajib-ul-arz* of a village gave a right of pre-emption by a clause providing that in case of transfer by any co-sharer of his rights and interests (*hakkiyat*), his partners should have a right to purchase the property transferred at the same price (*qimat*) as the vendee had given. One of the co-sharers transferred to a stranger one biswa and six dhurs of a grove or garden in exchange for another piece of land.

Held by the Full Bench that this transaction was a transfer of *hakkiyat* within the terms of the *wajib-ul arz.*

Held also that the plot of land which was given in exchange for the one biswa and six dhurs must be considered as a price (*qimat*), within the terms of the *wajib ul-arz.*

Per MAHMOOD, J., that the word "*qimat*" must be interpreted in the sense given to it by the Muhammadan law, including not only money, but other kinds of property capable of being valued at a definite sum of money, and covering the consideration of "sale" as well of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) respectively.

Niamat Ali *v.* Asmat Bibi 626

21, ————. *Wajib-ul-arz—"Transfer"—"Sale."*] On the 1st September, 1881, *L* and *R* entered into an agreement (which was duly registered) with *B*, that in consideration of their bringing a suit for recovery of a twelve annas share in a village which *B* claimed by right of inheritance against *G*, they should receive a moiety of the share. *L* and *R* found funds for the prosecution of two suits in respect of the shares, which on the 5th April, 1882, were compromised, *B* getting one anna and three pies out of the twelve annas originally claimed by her. In that compromise *B* stated as follows:—"I make over one

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anna to *L* and *R*, my partners, in lieu of the prosecution of the two cases. I, the plaintiff, shall remain in possession of the remaining three pies." Meanwhile, on the 3rd September, 1881, *G* had sold three annas out of the twelve annas share to *M*. On the 3rd April, 1883, *M* brought a suit against *L* and *R*, claiming the right of pre-emption in respect of the one anna which they had acquired from *B*, on the allegation that the transfer of the share had taken place on the 5th April, 1882. This claim was based on the *wajib ul-arz* of the village which gave a right of pre-emption to the co sharers of any sharer wishing to "transfer" his share.

Held that the compromise of the 5th April, 1882, was only a re-adjustment of the amount of the interest in the share between *B* and *L* and *R*; that the real transfer to *L* and *R* was given effect to on the 1st September, 1881, and that, this having been prior to the acquisition by *M* of any right in the village, he was not a co-sharer at the time of the transfer, and that he had consequently no right as against *L* and *R* by way of claim for pre-emption.

Lachmi Narain *v* Manog Dat 291

22. PRE-EMPTION. *Wajib-ul-arz—Transfer under compromise and decree th reon to person claiming pre-emption.*] An appeal having been preferred from a decree in a suit for pre-emption based on the *wajib-ul-arz* of a village, the parties to the suit entered into a compromise whereby the plaintiff-pre-emptor relinquished his claim to a part of the property in dispute in favour of the defendants-vendees, and the latter admitted his claim in respect of the remainder of the property. Upon this compromise a decree was passed. Subsequently a co-sharer in the village where the property was situate brought a suit for pre-emption, upon the contention that the compromise and the decree passed thereon amounted to a transfer to the plaintiff in the former suit, within the meaning of the *wajib-ul-arz*. *Held* that the suit was not maintainable.

Hanuman Rai *v.* Udit Narain Rai 917

PUBLIC HIGHWAY. *Diversion of road—Right of owners of land adjoining old road—Grant by Municipality of land forming old road—Act XV of* 1873, *s* 38] There is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land.

S. 38 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act) was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such rights on the Municipality, nor has the section any such effect.

In a case where such land ceased to be used as public highway, and was granted by the Municipality to third persons, who proceeded to build thereon,—*held* that the owners had a good cause of action against such persons for the demolition of the buildings and restoration of the property to its original condition.

Nihal Chand *v.* Azmat Ali Khan ... — ... 362

PUBLIC PROSECUTOR, DUTY OF. *See* Witnesses.

PUNISHMENT FOR MORE THAN ONE OF SEVERAL OFFENCES. *See* Magistrate, powers of.

PURCHASE-MONEY. *See* Pre-emption 9.

QUESTION FOR COURT EXECUTING DECREE. *See* Civil Procedure Code, s. 244; s. 583.

REGISTERED AND UNREGISTERED DOCUMENTS. *See* Act III of 1877, s. 50. Mortgage, 4.

REGISTRATION, PLACE OF. *Act VIII of* 1871 (*Registration Act*), *ss.* 28, 85—"*Whole or some portion of the property.*"] The terms of s. 28 of Act VIII of 1871 must not be construed in their literal sense, inasmuch as to do so would defeat the intention of the Legislature that

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registration should be made with reference to the locality of the property to which the document relates; and hence the words of the section "some portion of the property" must be read as meaning some *substantial* portion.

A bond which purported to mortgage 500 square yards of land situate at *P*, two entire villages and shares in fourteen villages in the *G* district, and a village in the *C* district, and which required registration under Act VIII of 1871, was registered at *P*.

Held that the bond was not properly registered in accordance with the provisions of s. 28 of Act VIII of 1871.

Per MAHMOOD, J —The imperative direction of s. 28 of Act VIII of 1871 is addressed not to the registering officer, but to the person presenting a document to that officer for registration; and therefore s. 85, which refers only to defects in the appointment or procedure of the registering officer, could not cure the irregularity which was committed under s. 28.

Sheo Dayal Mal *v.* Hari Ram 590

RELEASE. *Mortgage—Agreement, for fresh consideration, between mortgagee and third person for release of property from mortgage—Release not required to be in writing and registered.*] The mortgagee of immoveable property under a hypothecation bond entered into an agreement with one who was not a party to his mortgage to release part of the property from liability under his mortgage. This agreement was not in writing and registered. The mortgagee subsequently sought to enforce the hypothecation against the whole of the mortgaged property.

Held that the agreement, being a new contract for a fresh consideration between persons who were not parties to the mortgage, was not, as between the parties to the mortgage, a release which the law required to be in writing and registered.

Held also that the party to the agreement with the mortgagee might have come into Court as a plaintiff to enforce the same, and that it was equally competent for him to plead it in avoidance of the mortgagee's claim to bring to sale the property referred to therein. *Nash* v. *Armstrong* referred to

Gurdial Mal *v* Jaubri Mal 820

RELIGIOUS ENDOWMENT. *See* Mosque.

REMAND. *Appeal from order of remand—Civil Procedure Code, ss* 562, 564, 566, 584, 588 (28), 590.] Where a lower appellate Court, instead of remanding a suit under s. 566 of the Civil Procedure Code, erroneously remands it under s. 562, and the party aggrieved by its order appeals to the High Court, under clause (28), s. 588, the High Court cannot deal with the case as if it were a first appeal from a decree. All that the High Court can do is to rectify the procedure of the lower appellate Court and to direct that it decide the case itself on the merits.

Badam v. *Imrot* distinguished. *Ramnarain* v. *Bhawanidin* and *Sheoamber Singh* v. *Lallu Singh* referred to.

Sohan Lal *v.* Aziz un-nissa Begam 136

———. *See* Arbitration.

RES JUDICATA. *See* Appeal. Civil Procedure Code, s. 13.

RESTITUTION. *See* Civil Procedure Code, s. 583.

RESUMPTION OF RENT-FREE GRANT. *See* Jurisdiction, 4.

RESULTING TRUST. *See* Trust.

REVENUE, LIABILITY OF LAND TO ASSESSMENT OF. *See* Jurisdiction, 8.

REVIEW OF JUDGMENT. *Criminal case—Criminal Procedure Code, s.* 369] The High Court has no power under s. 369 of the Criminal Procedure Code to review an order dismissing an appliction for revision made by an accused person, and the only remedy is by an

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appeal to the prerogative of the Crown as exercised by the Local Government.

Per BRODHURST, J.—The Legislature has not conferred in express words upon a High Court the power of reviewing its judgments in all criminal cases as it has done under the Civil Procedure Code in civil cases; and the provisions of s 369 of the Criminal Procedure Code, so far as they affect the High Court, apply merely to questions of law arising in its original criminal jurisdiction, and which are reserved and are subsequently disposed of under the provisions of s 434 of the Criminal Procedure Code and ss 18 and 19 of the Letters Patent for the High Court of the North-Western Provinces. *Queen* v. *Godai Raout* referred to.

Queen Empress *v.* Durga Charan 672

"RIGHT TO SUE." *See* Civil Procedure Code, s. 407 (*c*) Mosque.

RIOTING *See* Criminal Procedure Code, s. 35. Magistrate, powers of.

"SALE." *See* Pre-emption, 4.

——, ORDER CONFIRMING. *See* Civil Procedure Code, ss. 311, 312.

——, ORDER DISALLOWING OBJECTIONS TO. *See* Civil Procedure Code, ss. 311, 312.

SALE IN EXECUTION OF DECREE. *Sale set aside on objection by third person—Suit to have sale confirmed—Declaratory decree—Civil Procedure Code, ss.* 244, 278, 283, 311—*Act I of* 1877, *s.* 42.] *Held* that persons other than the decree-holders or the persons whose property was sold in execution of decree were not competent to apply to the Court under s 311 of the Civil Procedure Code to set aside the sale.

M, in whose name property had been purchased at an execution sale which was improperly set aside, brought a suit to have the order setting aside the sale reversed, and the sale confirmed in her favour, and for a declaration that the property was not liable to be sold in execution of a decree of the defendants against third persons, under which it had been attached and advertised for sale.

Held that such a suit could only be maintained under s. 42 of the Specific Relief Act (I of 1877) but that s. 244 of the Civil Procedure Code indicated the intention of the Legislature that such questions should be determined in the execution department, and, reading together the provisions of ss. 244, 278, and 283 of the Code, the suit was premature, and therefore not maintainable.

Man Kuar *v.* Tara Singh 583

——————————. *See* Alluvion.

"SANCTION." *See* Criminal Procedure Code, s. 195.

SECURITY FOR COSTS. *See* Practice.

SENTENCES, SEPARATE *See* Criminal Procedure Code, s 35.

SEPARATE SUIT. *See* Civil Procedure Code, s. 244 : s 583.

SET-OFF. *Civil Procedure Code, s.* 111—"*Ascertained*" *sum—Act XV of* 1877, *s.* 22, *sch* ii, *Nos.* 52, 53, 83.] A suit was brought by *P* against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November, 1879. The suit was brought on the 10th October, 1882. In January, 1883, the partners of the Elgin Mills Company were, on their own application, brought upon the record as defendants. Defendants claimed a set off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October, 1879, and subsequently.

Held that art 53, and not art. 52, sch. ii of the Limitation Act was applicable to the plaintiff's claim, the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed by the whole wood being supplied, or when the contract came to an end.

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Held that although, taking the word "ascertained" to mean "liquidated," the claim of the defendants for damages would not come within the meaning of a set-off under s. 111 of the Civil Procedure Code, that section was one regulating procedure, and was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions; that the right of set-off would be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arose out of one and the same transaction, or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit, and that as, in the present case, the claim sprang out of the same contract which the plaintiff sought to enforce, and could readily be determined in the same suit, it was equitable that it should be so determined. *Gauri Sahai* v. *Ram Sahai*, *Kistnasamy Pillay* v. *The Municipal Commissioner of Madras*. and *Kishor Chand Champa Lal* v. *Madhowji Visram* followed.

Held that the law of limitation applicable to the set-off was art. 83, sch. ii of the Limitation Act; that limitation would run from the time when the plaintiff was actually damnified, and should be reckoned to the date of the institution of the suit, and not to that of claiming the set-off, which was after the defendants' names were brought on the record, and that the set-off was therefore in time. *Walker* v. *Clements* referred to.

Per OLDFIELD, J.—That the excess of the set-off in favour of the defendants over and above the claim of the plaintiff might properly be decreed to them, and that the set-off should be allowed, if at all, to its full extent and not merely to the extent of defeating the claim.

Per DUTHOIT, J.—That although the set-off might properly be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, the defendants could not, failing the provisions of s. 111 of the Civil Procedure Code, be allowed to recover a sum of money from the plaintiff, they having paid no court fees on that account.

Held that s. 22 of the Limitation Act refers to cases where a new defendant is substituted or added, and that when the partners of the Elgin Mills Company were brought on the record as defendants in January, 1883, there was no institution or addition of new defendants, the defendants having been comprised in the designation of Elgin Mills Company, and at most what was done was to correct a misdescription

Pragi Lal *v.* Maxwell 284

SIMPLE MORTGAGE. *See* Pre-emption, 15.

SIR LAND. *See* Act XII of 1881, s. 7: ss. 7, 9. Mortgage 1,

SMALL CAUSE COURT SUIT *Suit for enforcement of hypothecation against moveable property—Act XI of* 1865 (*Mufassal Small Cause Courts Act*), *s.* 6.] A suit was brought in a Small Cause Court to recover a sum of money from the defendants personally, and by enforcement of hypothecation of certain cattle by their attachment and sale. The cattle were in the hands of other persons who had purchased them at an auction-sale in execution of a decree against the original defendants and who were added as defendants under s. 32 of the Civil Procedure Code.

Held that the suit was not cognizable by a Small Cause Court, inasmuch as it did not fall under the category of a "suit for money due on a bond, or other contract" or of a "suit for personal property, or for the value of such property," within the meaning of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865), and that the Court had no jurisdiction to hold the defendants who were added under s. 32 of the Civil Procedure Code liable to the extent of the value of the cattle in their hands. *Ram Gopal Shah* v. *Ram Gopal Shah* and *Godha* v. *Naik Ram*, referred to.

Surajnál Singh *v.* Jairamgir 855

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SMALL CAUSE COURT SUIT. *Suit to recover a share of money recovered by co-plaintiff under a decree—Act XI of* 1865 (*Mufassal Small Cause Courts Act*), *s.* 6.] *Held* that a suit to recover a share of money which had been recovered by a co-plaintiff under a decree was a claim for money due on a contract, within the meaning of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865), and was, therefore, a suit of the nature cognizable by a Court of Small Causes, in which, under s. 586 of the Civil Procedure Code, no second appeal could lie.
Debi Das *v.* Lachman Singh 896

——— ——— ——— ———. *See* Civil Procedure Code, s. 295. Suit for personal property, Suit for money had and received for plaintiff's use.

STATUTE 11 and 12 VIC, c 21, ss 7, 49. *See* Execution of decree 4.

——— ——— ——— ———, s 24 *Insolvent—Voluntary transfer*] On the 12th March, 1881, a firm, the partners of which were subsequently, within two months from that date, adjudicated insolvents under 11 and 12 Vic., c 21, suspended payment On the night of the previous day, the 11th March, one of the creditors of the firm, the impending bankruptcy of the firm having become known, urged the latter to make over a part of their stock-in-trade as security for the debt, and to this the insolvents consented. The only pressure which appeared to have been exercised was that, on the 11th March, security was demanded from the insolvents.

Held that there having been no pressure which could not be resisted, and no legal proceedings having existed against the insolvents or which they could have feared, the transaction was a voluntary transfer, and therefore void under s. 24 of 11 and 12 Vic., c. 21.
Phulchand *v.* Miller 340

SUBORDINATE JUDGE, COMPETENCY OF, TO TRY MUNSIF'S CASE. *See* Jurisdiction, 5.

SUIT, FORM OF. *See* Mosque.

SUIT AGAINST TRUSTEE FOR POSSESSION OF SHARE AND FOR ACCOUNT AND RECOVERY OF PROFITS. *See* Trust.

——— BY ASSIGNEE OF RENT AGAINST TENANT. *See* Jurisdiction, 1.

——— BY LANDLORD TO DETERMINE NATURE OF TENANT'S TENURE. *See* Jurisdiction, 6.

——— BY TRANSFEREE FOR DECRETAL AMOUNT. *See* Execution of decree, 3

——— FOR DISSOLUTION OF PARTNERSHIP. *See* Jurisdiction, 10.

——— FOR EJECTMENT OF OCCUPANCY-TENANT. *See* Occupancy-tenant.

——— FOR MONEY CHARGED ON IMMOVEABLE PROPERTY. *See* Act XV of 1877, sch. ii, No. 132.

——— FOR MONEY CHARGED ON RENTS AND PROFITS. *See* Act XV of 1877, sch. ii., No 132.

——— FOR MONEY HAD AND RECEIVED FOR PLAINTIFF'S USE. *Suit for share of compensation awarded for land acquired for public purposes—Small Cause Court suit*] A suit was brought by some of the co-sharers in a patti of a mahal in which land had been taken for public purposes under the Land Acquisition Act, against the other co-sharers in the patti for the proportion due to them out of a sum of money which had been awarded as compensation for the acquisition of the land, and which the defendants had received.

Held that the suit was one for money had and received for the plaintiff's use, and was therefore cognizable by a Court of Small Causes. *Mohan* v. *Mathura Das* followed.
Umrai *v.* Ram Lal 38

SUIT FOR PERSONAL PROPERTY. *Suit to establish right—Small Cause Court suit—Civil Procedure Code, s* 283—*Act XI of* 1865, *s.* 6] A person who had claimed moveable property attached in execution of a decree as his own, and whose claim had been investigated and disallowed under ss. 278 to 281 of the Civil Procedure Code, sued,

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the property being under attachment, the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value. *Held* that the suit could not properly be regarded as a suit "for personal property or for the value of such property," within the meaning of s. 6 of Act XI of 1865, but must be regarded as a suit to establish the plaintiff's right, in the sense of s. 283 of the Civil Procedure Code, inasmuch as the plaintiff could not recover the property without clearing out of his way the order of attachment, which he could only do by establishing his right in the sense of s. 283, and therefore the suit was not one cognizable in a Court of Small Causes.

Janaki Ammal v *Vithenadien*, *Kundeme Naine Booche Naidoo* v. *Ravoo Lutchmeepaty Naidoo*, *Gordhan Pema* v *Kasandas Balmukundas*, *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram*, *Balkrishna* v. *Kisansing*, and *Radha Kishen* v. *Chotey Lal* dissented from.

Godha *v.* Naik Ram 152

SUIT FOR PROFITS. *See* Court-fees.

——FOR RECOVERY OF MESNE PROFITS. *See* Civil Procedure Code, s 244.

—— FOR REDEMPTION OF MORTGAGE *See* Act I of 1872, ss. 63 (*c*), 114, *Illustration* (*g*).

——FOR REFUND OF PROCEEDS OF EXECUTION SALE. *See* Civil Procedure Code, s 295.

——FOR SHARE OF COMPENSATION AWARDED FOR LAND REQUIRED FOR PUBLIC PURPOSES. *See* Suit for money had and received for plaintiff's use

SUIT *IN FORMA PAUPERIS*. *See* Civil Procedure Code, s. 407 (*c*).

SUIT TO ESTABLISH RIGHT *See* Suit for personal property.

SUIT TO HAVE EXECUTION-SALE CONFIRMED. *See* Sale in execution of decree.

SUIT TO SET ASIDE EXECUTION-SALE. *See* Execution of decree, 8.

TEMPORARY INJUNCTION. *See* Civil Procedure Code, ss. 492, 494.

TESTAMENTARY DECLARATION. *See* Declaratory decree, 1.

TRANSFER OF PROPERTY. *See* Condition restraining alienation.

TRUST. *Resulting Trust—Suit against trustee for possession of share and for account and recovery of profits—Act XV of* 1877, *s.* 10, *and sch* ii, *Nos.* 62, 89, 120.] *M* and *S* purchased certain property jointly in 1865, and had equal interests in it till 1868, when *M's* interest was reduced to one-third. *S* paid the entire purchase-money in the first instance and incurred expenses in conducting suits for possession of the property and for registration of the deed, and ultimately obtained possession in 1869 or 1879 and took the profits from that date *M* did not pay any part of the money up to 1870, and it was not till 1871 that the whole of his share of it was subscribed, and he paid little or nothing towards the expenses. Subsequently he sued *S* for possession of his share, to have an account taken of the profits, and to recover his share of them, with future mesne profits and costs.

Held that, under the above circumstances, there was a resulting trust in favour of the plaintiff, and the defendant became liable to account to him for his share; but inasmuch as there was no express trust, and the property did not become vested in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, and the suit was not brought for the purpose of following such trust property in the hands of a trustee within the meaning of the section, such suit was not one which, under s. 10, might not be barred by any length of time. *Balwant Rao Bashirat Chor* v. *Puran Mal Chobey* referred to.

Held also that No. 89 of schedule ii of the Limitation Act did not apply to the suit; and that No. 62 did not meet a claim like the present, relating to an equitable claim against a trustee liable to account, in which the relief sought was to have an account taken of the trust property and to recover what might be due. *Guru Dayal Pyne* v *Ram Narain Sahu* referred to.

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Held also that No, 120 of schedule ii of the Limitation Act applied to the suit, as it was one for which no period of limitation was provided elsewhere in the schedule.

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VOLUNTARY TRANSFER. *See* Statute 11 and 12 Vic., c. 21, s. 24.

WAIVER. *See* Pre-emption, 10.

WAJIB-UL-ARZ. *See* Pre-emption, 6. 7, 15, 16, 17, 18, 19, 20, 21, 22.

WITNESSES. *Practice—Trial in Sessions Court—Non-production of material witnesses for Crown—Duty of Public Prosecutor.*] It is the duty of the Public Prosecutor at a trial before the Court of Session to call and examine all material witnesses sent up to the Court on behalf of the prosecution, and the Judge is bound to hear all the evidence upon the charge.

The Public Prosecutor is not bound to call any witnesses who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence ; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses.

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